Supreme Court, U.S.
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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1994

AMERICAN WATER DEVELOPMENT, INC.,
a Colorado corporation,

Petitioner,

v.

CITY OF ALAMOSA, et al.,

Respondents.

Petition For Writ Of Certiorari
To The Colorado Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER COLORADO'S COURTS IMPERMISSIBLY DIMINISHED RIGHTS GRANTED BY HISPANIC LAW IN VIOLATION OF THE TREATY OF GUADALUPE HIDALGO BY ALLOWING A COLLATERAL ATTACK ON THE DETERMINATION MADE BY CONGRESS AND THE U.S. GOVERNMENT SURVEYOR THAT THE BACA GRANT RANCH NO. 4 IS A CONFIRMED HISPANIC LAND GRANT.

II. WHETHER DUE PROCESS WAS VIOLATED BY THE MONEY JUDGMENT AWARDED TO "OBJECTORS" WHO VOLUNTARILY ENTERED AWD'S WATER PROCEEDINGS BECAUSE AWD NEVER HAD A FULL AND FAIR OPPORTUNITY TO CONTEST THEIR ENTITLEMENT TO THE AWARD, AND UNDER COLORADO LAW THE OBJECTORS NEVER HAD TO SATISFY ANY STANDING REQUIREMENTS.

PARTIES TO THE PROCEEDING

The Petitioner is American Water Development, Inc., a Colorado corporation ("AWD"). Pursuant to Rule 29.1, AWD states that its parent corporation is First Colorado Corporation, a Delaware corporation, and that it has no subsidiaries except wholly owned subsidiaries.

The following parties are Respondents: The City of Alamosa; County of Alamosa; Fred Bauder; Richard Blumenhein; Bonanza Road Water Users, Owners and Objectors; David P. Collins; Barbara J. Collins; Colorado Division of Wildlife; Colorado Water Conservation Board; Conejos Water Conservancy District; Town of Crestone; Oliver Powell Roemer, III, Successor Trustee under the Trusts under the Will of Avis Neal Roemer; Ernest Lamar Goodwin; Town of Lajara; Lazy KV Estates Homeowners Association, Inc.; Marold Ranches; R.G. Marold; Town of Monte Vista; Howard R. Platz; Rio Grande County Commissioners; Rio Grande Water Conservation District; Rio Grande Water Users Association; County of Saguache; San Luis Valley Irrigation Well Owners, Inc.; San Luis Valley Water Conservancy District; Loren R. Santisteven; Julie A. Santisteven; Jeris A. Danielson, State Engineer; Steven E. Vandiver, Division Engineer; United States of America; Villa Grove Area Water Users, Owners and Opposers.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

Petitioner, American Water Development, Inc. ("AWD") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Colorado entered in this proceeding on May 9, 1994.

OPINIONS OF LOWER COURTS

The Colorado Supreme Court issued its opinion in this matter on May 9, 1994. The opinion is reported at 874 P.2d 352 (Colo. 1994) and is reprinted beginning at A-1. The Order of the Colorado Supreme Court denying rehearing, dated June 6, 1994, is not officially reported. It is reprinted at A-131. The subject orders of the Colorado water court are not officially reported; they are reprinted at A-94-130.

JURISDICTION OF THIS COURT

1. The judgment sought to be reviewed was entered by the Colorado Supreme Court on May 9, 1994.

2. Petition for Rehearing was denied on June 6, 1994. No extension of time for the filing of this Petition has been requested or granted.

3. Jurisdiction is conferred pursuant to 28 U.S.C. § 1257(a).

APPLICABLE STATUTES, TREATIES AND CONSTITUTIONAL PROVISIONS

U.S. CONST. amend XIV § 1: "nor shall any State deprive any person of life, liberty, or property, without due process of law."

U.S. CONST. art. VI, cl. 2: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

COLO. CONST. art. XVI § 5: "Water of streams public property. The water of every natural stream, not heretofore appropriated, within the state of Colorado, is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the state, subject to appropriation as hereinafter provided."

COLO. CONST. art. XVI § 6: "Diverting unappropriated water – priority preferred uses. The right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied. Priority of appropriation shall give the better right as between those using the water for the same purpose; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall have the preference over those claiming for any other purpose, and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes."

COLO. REV. STAT. § 37-92-302(1)(b): "Any person, including the state engineer, who wishes to oppose the application may file with the water clerk in quadruplicate a verified statement of opposition setting forth facts as to why the application should not be granted or why it should be granted only in part or on certain conditions."

Treaty of Peace, Friendship, Limits, and Settlement with the Republic of Mexico (Treaty of Guadalupe Hidalgo), A-195.
Act of July 22, 1854 Ch. 103, 10 Stat. 308, A-220.
Act of June 21, 1860, Ch. 167, 12 Stat. 71, A-234.
Act of June 11, 1864, Ch. 123, 13 Stat. 125, A-238.

STATEMENT OF THE CASE

Water is like gold in the West. Roughly two billion acre-feet of groundwater exist in the San Luis Valley of southern Colorado. *Alamosa-LaJara Water Users Protection Ass'n v. Gould*, 674 P.2d 914, 917 (Colo. 1983). In 1986 AWD filed its application in Colorado's local water court to withdraw one hundredth of one percent of that groundwater annually from beneath lands it owns or controls. A-133-155. The treatment of AWD's application implicates broad legal and policy concerns that affect critical federal, state and private interests throughout the vast lands in the American Southwest that once belonged to Spain.

In 1706 southern Colorado was claimed for the Spanish King. A-270, 277. The area was governed by decrees issued by the Spanish Crown, laws passed by the Royal Council of the Indies, and local legislation enacted by provincial governors and local town councils. A-274. Southern Colorado formed the northern boundary of Mexico when it won independence from Spain in 1821. *Id.* The area was then governed by the general laws of the Mexican Republic and by a series of Mexican constitutions promulgated in 1824, 1836 and 1843. *Id.* For matters not covered by Mexican law, reference was made to Spanish law. *In Re Water Rights of the Medina River Watershed*, 670 S.W.2d 250, 252 (Tex. 1984).

Settlement of New Mexico and southern Colorado was encouraged by the use of land grants, first from Spain and later from the Mexican government. Grants were made to individuals and families, and sometimes to groups of settlers. A-281-285. In January, 1821, the provincial deputation of the State of Durango, New Spain, granted to Luis Maria Cabeza de Baca approximately 500,000 acres of land, known as the Vegas Grandes, in what is now northern New Mexico. A-164. The grant to Baca and his seventeen sons was affirmed by Mexico in 1825, after it gained indepen ence from Spain. A-165. In 1835, long after the grant to Baca, a grant was made by the Mexican government to a group of settlers who founded the Town of Las Vegas upon the Vegas Grandes. A-170-175.

In 1848, the United States agreed to end the Mexican-American war. The Treaty of Guadalupe Hidalgo, ratified by Congress in 1848 (the "Treaty"), set forth the agreement between the United States and Mexico to end hostilities. A-195-219. Under the Treaty, Mexico ceded to the United States lands north of the Rio Grande River, including what is now California, Nevada, and Utah, and parts of New Mexico, Arizona, Wyoming and Colorado. Bowden, *Spanish and Mexican Land Grants in the Southwest*, 8 U. WYO. LAND & WATER L. REV. 467, 468 (1973). The southwestern portion of the ceded territory contained 303 Spanish or Mexican land grants covering 35.85 million acres. *Id.* at 472. It included the land granted to Baca and his heirs. Under the Treaty, the United States agreed to protect and preserve the rights of Mexican citizens in ceded lands. A-195, 203 and 204.

Congress implemented these provisions of the Treaty by the Act of July 22, 1854, Ch. 103, 10 Stat. 308 (the "1854

Act"), which directed the Surveyor General for the New Mexico Territory to "(1) determine the extent of all claims under the laws, usages and customs of Spain and Mexico, and (2) report [to Congress] his decision on the validity of all such claims *as originated before the cession of the territory . . . to the United States* (emphasis added)." A-220, 223. Section 8 of the 1854 Act required the report to be presented to Congress as the final arbiter, so it might "confirm bona fide grants." The 1854 Act also reserved all of the ceded Territory of New Mexico (which included the San Luis Valley of southern Colorado) from the public domain pending settlement of the land claims. A-224.

The Surveyor General found the grant to the Baca heirs to be valid and enforceable, and recommended confirmation. A-193, 227, 232, 233. Based upon the Surveyor General's Report, Congress confirmed the grant to the heirs of Baca on June 21, 1860 in § 3 of the Act of such date, Ch. 167, 12 Stat. 71 (the "1860 Act"). A-234-237. The 1860 Act also confirmed the claim of the Town of Las Vegas. *Id.* By the time the claims of the Baca heirs and the Town of Las Vegas were presented to Congress in 1860, several hundred families had taken up residence on the Vegas Grandes site. S. Rep. No. 228, 36th Cong. 1st Sess. (1860). A-227, 232. The Surveyor General chose not to decide the conflict between the Baca heirs and the Town as to which of them was entitled to the Vegas Grandes location, and left the matter to Congress to resolve. The Congressional record indicates that the heirs of Baca agreed to subordinate their site priority to that of the other settlers by waiving their senior site priority[1] and

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[1] This was a waiver of a *site priority* only, and nothing more. *Wise v. Watts*, 239 Fed. 207, 226 (9th Cir. 1917).

exchanging equities. A-232-233. The Baca heirs received a "floating grant" in payment for waiving their senior site priority. Congress formalized this arrangement by effecting the grant pursuant to § 6 of its 1860 Act.

Within the three-year limits set by Congress in the 1860 Act, the heirs of Baca or their assignees selected certain parcels of land under the floating grant. One of those parcels, containing approximately 100,000 acres, is located in what is now Saguache County, Colorado, and is known as the Baca Grant Ranch No. 4 (the "Baca Grant 4"). A-8.

In 1986, AWD, owner of the Baca Grant 4, filed an application in the Water Court, First Division, seeking an adjudication of rights to groundwater underlying the ranch and other smaller parcels of property owned by it. A-133-155. AWD's application sought water rights under four alternative theories. Claim I sought to withdraw non-tributary groundwater as specified by Colorado statute (the "Non-tributary Claim"). A-138-143. Under Claims II and III, AWD sought a declaration that it owned all of the underground water, tributary or otherwise, beneath the Baca Grant 4. A-143-150. Claim II was based on the status of AWD's predecessors in interest as the *confirmed grantees* of nearly 500,000 acres of land, 100,000 of which formed the Baca Grant 4. Title derived *directly* from grants made by the Spanish and Mexican governments. Alternatively, under Claim III, AWD claimed to be the beneficiary of a grant from the United States having the same effect. (Claims II and III are AWD's "Land Grant Claims".) In Claim IV, AWD sought to withdraw water under Colorado's statutes governing the appropriation of tributary groundwaters (the "Tributary Claim"). A-151-153.

Notice of AWD's application was given pursuant to statute, and "Statements of Opposition" were filed by 128 "Objectors." Colorado allows "any person" to enter such water proceedings as an Objector without satisfying any standing requirements whatsoever, COLO. REV. STAT. § 37-92-302(1)(b) (1993), let alone the traditional tests for standing developed by the federal courts and adopted by the courts of Colorado. Objectors often oppose water applications in Colorado, and in doing so they are not required to show they suffer any concrete "injury in fact" that distinguishes their interests from those of the public at large.

The Objectors sought summary dismissal of the Land Grant Claims. After a short argument, the trial judge declared from the bench that "the Applicants have neither the facts nor the law on their side." He then *summarily* dismissed AWD's Land Grant Claims "for all of the reasons argued by objectors." A-101-109. On direct appeal to the Colorado Supreme Court, AWD raised, in its briefs and upon oral argument, the federal land grant questions asserted herein, as set out in the court's opinion. A-12-29. The Colorado Supreme Court affirmed, holding Baca Grant No. 4 is not really an Hispanic land grant, and no water rights were conveyed by grant from the United States. A-20-29.

AWD neither specified nor sought out the Objectors who entered its water court proceedings. AWD had no control over who the Objectors were, or how many of them it would face. It had no effective way to rid itself of their intervention. The Objectors voluntarily came forward to have their say in the politically-controversial case. By their own admission, they used the unusual freedom given by Colorado to Objectors to wage more than legal warfare in the water court. When asked, for example, why they never filed dispositive motions on AWD's Tributary Claim, an attorney for the United States,

which entered the case as an Objector, frankly conceded: "So we didn't file a dispositive motion because [even] a dismissal with prejudice . . . may not preclude them from coming back. . . . So it's perfectly legitimate to destroy the enemy on the battlefield while you have him decisively engaged rather than let them get away to fight another day." A-360, 361.

An affidavit voluntarily filed with the water court by a former attorney for the State of Colorado, another Objector in the case, corroborates the candid admissions of the U.S. attorney. The affidavit demonstrates the Objectors deliberately chose not to seek pretrial disposition of AWD's Tributary Claim, despite their awareness of grounds for doing so. A-367-369. The Objectors instead pursued a political agenda that went far beyond defeating AWD in court.

The Objectors' political strategy paid off. Shortly before trial, AWD realized it could not prevail on its Tributary Claim because adverse pretrial rulings had decimated its legal position, and its inability to secure end-user contracts precluded its satisfaction of Colorado's factual predicates for withdrawal of tributary water. AWD moved to withdraw its Tributary Claim without prejudice under Colorado's analog to Fed.R.Civ.P. 41(a), so it could proceed to trial on its remaining theories. A-356; A-358-359.

At first the Objectors opposed AWD's motion. The volunteers, it seems, had voluntarily taxed themselves, assessed themselves, and borrowed heavily to support their efforts to defeat AWD. A-362-364. Final and decisive victory was their stated goal. Soon, however, the Objectors changed their position when they realized that, in exchange for the dismissal without prejudice which AWD

sought in good faith, the water court was willing to award to them the substantial attorneys' fees and costs incurred by them in connection with their battle against AWD. The court went so far as to order AWD to pay not only those fees and costs attributable to work that could no longer be used in the case, but rather *all* fees and costs "related to" the Objectors' opposition to the Tributary Claim, even though much of the work that went into that opposition could be used – and later was used – in the trial of AWD's other claims. A-113; A-118.

The judge denied AWD's repeated requests for a due process hearing that would provide a full and fair opportunity for AWD to contest the Objectors' entitlement to such an unusual award, unprecedented as it was in the specialized arena of Colorado's water court proceedings. A-121; A-127; A-129-130. The water court revealed its predisposition to prejudge the applicant's due process concerns when the judge stated, on the record, "I'm mak[ing] the assumption your motion is going to go down in blazing technicolor." A-119-120. A hearing was held, months after the trial on AWD's remaining claims, for the sole purpose of ascertaining the amounts to be awarded to the Objectors. In May of 1992 a $2.7 million judgment was entered against AWD and in favor of the Objectors. Most of that judgment reflected the attorneys' fees and costs that were sought by the Objectors in connection with the pretrial dismissal of AWD's Tributary Claim. AWD was never given the opportunity to accept the award as reasonable "terms and conditions" imposed upon it for the dismissal of its Tributary Claim without prejudice, or to reject the award and take instead a dismissal of that claim with prejudice.

On appeal AWD raised its cluster of standing, due process and related concerns in its opening brief, A-371-374; in its reply brief, A-375-376; in its petition for rehearing, A-377-380; and during oral argument. The Colorado Supreme Court upheld the award in all respects. A-64-93; 874 P.2d at 379-390.

ARGUMENT

I. THE COURTS BELOW IMPERMISSIBLY DIMINISHED RIGHTS GRANTED BY HISPANIC LAW IN VIOLATION OF THE TREATY BY ALLOWING A COLLATERAL ATTACK ON THE DETERMINATION MADE BY CONGRESS AND THE GOVERNMENT SURVEYOR THAT THE BACA GRANT 4 IS A CONFIRMED HISPANIC LAND GRANT.

Rights to the ownership and use of water have been regulated since the beginning of recorded history. Under the Supremacy Clause, the State of Colorado must respect as binding upon it the rules governing those rights that Congress acknowledged in the Treaty.[2] In its Land Grant Claims, AWD claims rights under the Treaty to groundwater historically considered as percolating underground water. The law relevant to this claim was promulgated in 1256 in the Spanish Code "Las Siete Partidas". Under the Partidas, underground waters are presumed to be percolating waters, owned by the surface owner, who is entitled to draw those waters from his land at will. *Maricopa*

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[2] Review by this Court of the state courts' actions is proper, because a substantial federal question is raised about the nature of AWD's rights under the 1854, 1860 and 1864 Acts, particularly proper construction of the Acts, and the Treaty. *Summa Corp. v. California Ex Rel State Lands Com'n*, 466 U.S. 198, 201 (1984).

County Mun. Water Cons. Dist. v. Southwest Cotton Co., 39 Ariz. 65, 4 P.2d 369, 373 (Az. 1931). These underground waters were not subject to appropriation by other landowners, unless they ran in definite channels. *Id.* at 373. This Spanish law was brought to Mexico and was in effect at the time of the Treaty. *Id.* at 373.

Colorado became a Territory in 1861 and a State in 1876. Even before statehood, Colorado began to limit the Spanish concept of ownership of subterranean waters by the owner of the land. In its Constitution, Colorado declared that all waters in natural streams belong to the public. COLO. CONST. art. XVI, §§ 5, 6.

Colorado follows the doctrine of "prior appropriation" in establishing rights to water in its natural streams. *Colorado River Water Conserv. Dist. v. United States*, 424 U.S. 800 (1976). Under this doctrine, one acquires a right to water by diverting it from its natural source and applying it to beneficial use. *Id.* at 805. While theoretically the doctrine applies only to waters in natural streams, Colorado goes further than any other western state in applying the doctrine to groundwater as well as surface water. Colorado courts hold that *all* underground waters which by flowage, seepage, or percolation will eventually, if not intercepted, reach and become a part of a natural stream, either on or beneath the surface, are included as being part of a natural stream, subject to application of the prior appropriation doctrine. *Black v. Taylor*, 128 Colo. 449, 264 P.2d 502 (1953). There is even a presumption that *all* water in Colorado is part of a natural stream. *Whitten v. Coit*, 385 P.2d 131 (Colo. 1963). Most of the water in Colorado, whether underground or surface water, is accordingly treated as "tributary," and is useable only

under the doctrine of prior appropriation as implemented by Colorado's statutes and cases.

The courts below held that the water underlying the Baca Grant 4 was "tributary" as defined in COLO. REV. STAT. § 37-93-103(10.5). A-10. To the extent its rights are governed by Colorado rather than Hispanic law, AWD's claims to the water underlying its ranch thereby became subject to claims of others who have previously appropriated the water. And, to obtain a vested right recognized under Colorado law, so it can market the water or otherwise put it to use, AWD now must demonstrate an intent to take the water and put it to beneficial use by an open physical act sufficient to constitute notice to third parties. *Colo. River Water Conserv. Dist. v. Vidler Tunnel*, 594 P.2d 566 (Colo. 1979).

In short, AWD had to show it had contracts with users of all of the water claimed in the adjudication, that it could transport the water to the users, and that it could obtain all necessary permits. The Objectors successfully launched massive political efforts to prevent AWD from obtaining user agreements and any necessary rights-of-way or permits. A-342. The doctrine of prior appropriation, as applied to the water underlying the Baca Grant 4, effectively limits the water available to AWD, and increases the difficulty of putting that water to beneficial use.

The Land Grant Claims asserted, by contrast, that under the Treaty, AWD, as the owner of an Hispanic grant, retained all vested rights of property to which Baca was entitled under the laws of Mexico or Spain. AWD asserted that under Hispanic law, groundwater, whether tributary or non-tributary under Colorado law, was the property of the overlying surface owner, and Colorado

had no authority to deprive any such owner of his rights, at least without compensation.

Ninety years before AWD filed its case, *this Court* conclusively determined that the Baca Grant 4 is a confirmed Hispanic land grant. *Shaw v. Kellogg*, 170 U.S. 312, 341 (1898). The issues raised by AWD's application involve the nature and extent of the rights to underground water that passed to the successors of the Baca heirs under Hispanic law. What the Colorado Supreme Court decided, however, was something that was *not* open to readjudication: that the title to Baca Grant 4 was not derived from Spain or Mexico!

As this Court held in *Beard v. Federy*, 70 U.S. 478 (1865), the holder of a confirmed grant should not be required to establish the validity of his Hispanic title in subsequent litigation, for if collateral attacks are allowed against rights under Hispanic law, or the correctness of the prior actions of the United States, then the confirmation would fail to provide the very security of title that was intended. The confirmed owner could face inconsistent determinations of his rights, based on the whims of subsequent witnesses and juries. *Id.* at 492. In making this ruling, the Colorado courts deprived AWD of the rights assured to it as the successor to Mexican citizens protected by the Treaty, and also created dangerous precedent that allows state courts to readjudicate titles originated from Spain and Mexico, and confirmed by Congress over 130 years ago.

The Colorado courts have threatened the security of the vested rights of the heirs and successors of the original Mexican grantees, by revisiting and rejecting the conclusions made by the Surveyor General, and by Congress itself, that the grant to the heirs of Baca is indeed a

"confirmed" Hispanic grant. This result was a blatant effort to avoid addressing the politically-charged issue of the rights to underground water owned by the heirs of Baca, which passed to AWD.

A. State Courts Reach Inconsistent Decisions Regarding Water Rights Incident To Hispanic Land Grants.

With the status of water under thirty-plus million acres of the Southwest at stake, the implementation of U.S. treaty obligations respecting water rights has been left largely to the state courts. With environmental, property and development concerns in the forefront, the courts of the states have reached inconsistent results. A conflict exists among the highest courts of several states concerning the nature and extent of water rights derived from Hispanic land grants. Some cases have the practical effect of depriving owners of Hispanic grants of their rights under the Treaty. But the cases *all* hold that the existence and definition of water rights associated with Hispanic land grants are determined under the Spanish or Mexican law applicable at the time of the grant. *State v. Valmont Plantations*, 346 S.W.2d 853 (Tex. Civ. App. 1961), *aff'd*, 355 S.W.2d 502 (Tex. 1962); *Maricopa County Mun. Water Cons. Dist.*, 4 P.2d at 373-376.

Arizona, on the one hand, recognizes vested rights in percolating, subterranean waters under private lands based on Mexican law in effect at the time of the grant. *Maricopa County Mun. Water Cons. Dist.*, 4 P.2d at 373-376. California and New Mexico have also recognized that Hispanic grants carry water rights without any requirement that the grant expressly convey them. In *Cartwright v. Public Service Co.*, 343 P.2d 654 (N.Mex. 1958), the New

Mexico Supreme Court applied the Treaty to hold that under Hispanic law, the rights of the Town of Las Vegas to the waters adjacent to the land or flowing through it, as necessary for municipal purposes and supply of its inhabitants, were prior and superior to any right claimed under the laws of the state. The court relied upon two California decisions, *Vernon Irrigation Co. v. City of Los Angeles*, 106 Cal. 237, 39 P. 762 (1895), and *Lux v. Haggin*, 69 Cal. 255, 10 P. 674 (1886). Texas, by contrast, recognizes neither pueblo water rights nor surface water rights under Hispanic law, absent an express grant of such rights by the prior sovereign. *In Re Water Rights of the Medina River Watershed*, 670 S.W.2d at 252; *In Re Water Rights of the Cibolo Creek Watershed*, 568 S.W.2d 155 (Tex. App. 1978); *In Re Contests of City of Laredo*, 675 S.W.2d 257 (Tex. App. 1984). The inconsistencies among the cases, and the trend toward limiting treaty rights under them, deserve this Court's attention.

And while Colorado has not expressly ruled on the nature of the rights of owners of Hispanic grants, the decision in this case indicates a hostility to recognizing Hispanic rights. Both courts below declined to recognize Hispanic rights by determining, somehow, that Baca and his heirs were not even the holders of rights arising under Hispanic law! In reaching this conclusion, the Colorado courts misapprehended the Treaty and the Acts of Congress implementing it, and failed to consider their obligations under the Treaty to "inviolably" respect Mexican citizens' rights in ceded lands.

Such hostility by state courts to "inviolably respecting" rights of Mexican citizens in lands obtained from Mexico is not confined to Colorado and Texas. In *City of Las Vegas v. Oman*, 796 P.2d 1121 (N.M. App. 1990), the

New Mexico Court of Appeals invited diminishment of the pueblo rights recognized in the City of Las Vegas in the *Cartwright* case. The *Oman* court held that the lower court could receive evidence regarding the historical accuracy of the pueblo rights doctrine if it believed the state supreme court might reconsider the principles set forth in *Cartwright*. The decisions of the Colorado and New Mexico courts in this case and *Oman* evidence the trend in state courts toward disregarding Hispanic rights protected by the Treaty. The issues are not limited to water. *See, e.g., United States v. Abeyta*, 632 F.Supp. 1301 (N.Mex. 1986) (religious freedom) and *Rael v. Taylor*, 876 P.2d 1210 (Colo. 1994) (communal land rights).

No courts have overtly refused to recognize Hispanic rights altogether, but like the Colorado courts in this case, some of the decisions have had that effect. There is a disturbing trend toward limiting and ignoring rights vested in Hispanic land grants. The Colorado Supreme Court's decision is only the latest in this trend. This Court, by contrast, has consistently recognized the U.S. Treaty obligations and has recognized the need to preserve and protect rights under Hispanic law. Action by this Court is needed to stop the erosion by those states which trivialize Hispanic rights under the Treaty.

The Treaty is the supreme law of the land and the judges in every state are bound by it. U.S. CONST. art. VI, cl. 2. This Court should stop the continuing disregard of Treaty rights by state courts by accepting certiorari in this case and reviewing the actions of the Colorado courts.

B. Colorado Exceeded Its Authority in Determining that the Baca Grant 4 is Not a Confirmed Hispanic Land Grant.

The 1860 confirmation of the Baca Grant 4 as an Hispanic land grant has been acknowledged by Congress itself in enactments made since the 1860 Act. The history of Congress' confirmation starts with the 1854 Act, which directed the Surveyor General to determine, and report to Congress, the extent of all claims under Hispanic law. A-220, 223. Pursuant to the Surveyor's recommendation, Congress confirmed the grant to Baca and his heirs in section 3 of the 1860 Act, which specifically confirmed Claim No. 20, covering property known as the Vegas Grandes, which included the claims of Baca and the Town of Las Vegas. A-235. *Maese v. Herman*, 183 U.S. 572, 578 (1902). The claims of Baca and the Town overlapped; the Baca heirs waived their site priority; and they received a "floating grant" equal to their Vegas Grandes grant, to be located in the New Mexico Territory. A-232-233.

Congressional confirmation of the Hispanic grant to Baca and his heirs was conclusive and not subject to judicial review. *Henshaw v. Bissell*, 85 U.S. (18 Wall.) 255, 264 (1873); *Tameling v. U.S. Freehold and Emigration Co.*, 93 U.S. (3 Otto.) 644 (1877). Colorado now attempts to avoid the conclusive effect of this confirmation by simply rewriting the 1860 Act. The Colorado Supreme Court held that Congress' express confirmation of the grant to the Baca heirs confirmed only their claim to the Vegas Grandes, and not their right to an equal amount of land elsewhere based on the Hispanic grant. The Colorado courts further held that Congress' confirmation of the grant to Baca was, in effect, meaningless because it was somehow negated by provisions elsewhere in the Act

allowing the selection of an alternate but equal quantity of land.

This reconstruction of the 134 year-old 1860 Act misinterprets the "waiver of the older title" accepted by the Baca heirs. By this sleight of hand, the court evaded the need to even consider Hispanic law, and the Treaty obligations to honor it. Nowhere in the Congressional record does it appear, however, that the heirs of Baca were willing to waive their claim to an Hispanic grant of 500,000 acres. Nor does it appear anywhere that Congress intended that the Baca heirs give up *any* of their rights, other than the right to have their grant located at the Vegas Grandes. The heirs of Baca agreed only to subordinate their site priority to that of the Town settlers and exchanged equities. They did *not* waive their claim to a confirmed grant, but only their priority, accepting a floating grant in lieu of their claim to the specific property known as the Vegas Grandes. *See Lane v. Watts*, 234 U.S. 525, 528 (1914) (both grants were confirmed and the right was given to the heirs of Baca to select other lands equal in quantity to the lands claimed by Las Vegas); *Shaw v. Kellogg*, 170 U.S. at 641.

Shaw recognized that Congress confirmed in the Baca heirs the right to locate their 500,000 acres within the New Mexico Territory, which had been acquired from Mexico and set aside specifically in the 1854 Act to satisfy Mexican claims. *Id.* at 644. The right of the Baca heirs to receive their land, by virtue of an Hispanic grant, was all that was before Congress and all that it decided. The language of the 1860 Act can only be applied to an *existing* grant, and there is no indication that Congress intended to create any sort of new estate. Even though unlocated, the Baca grant was thus a confirmed, valid

grant derived from the prior sovereigns. That the property selected by the Baca heirs came out of the public domain does not change this conclusion. The United States acquired title to all lands ceded from Mexico subject to claims of Mexicans, whether grounded upon an inchoate or perfect title. *Newhall v. Sanger*, 92 U.S. 761, 764 (1875). Under the Treaty all such claims were to be ascertained and legally protected. *Id.*

In *Board of Cty. Cmm'rs v. Central Colo. Imp. Co.*, 95 U.S. 259 (1877), this Court addressed a nearly identical situation, in which Congress authorized the holder of an Hispanic grant to select lands in lieu of lands subject to a Mexican grant which had been occupied and improved by settlers. This Court stated: "We agree . . . that the title when perfected relates back to and is founded on the grant by Mexico; but since it was imperfect . . . no particular land passed under the grant until the selections were made under the act." *Id.* at 266. The Baca grant was perhaps similarly "imperfect" due to the overlap with the Town, but it was nonetheless a valid grant from the Mexican government, "perfected" upon relocation, and confirmed as such by Congress.

The Colorado Supreme Court, however, treated the floating grant as no different from any conveyance of lands from the public domain of the United States to a private citizen, blatantly ignoring that the claim of the Baca heirs arose directly from the Hispanic grant. This deprives AWD, as successor to the heirs of Baca, of those rights incident to Hispanic grants, which Congress solemnly agreed to honor in the Treaty.

Hispanic laws and customs allowed for floating grants, such as the one confirmed to the Baca heirs by Congress, which were as effective as grants for specific

parcels of property. *United States v. McLaughlin*, 127 U.S. 428, 448 (1888). Hispanic laws and customs also allowed for the selection of alternate lands when two parties were separately given grants to the same property by officials with proper authority, as can be seen from the Mexican order of 1825 which put Baca into possession of the Vegas Grandes. A-156, 189-190. The order provided that even if settlers had constructed improvements upon the Vegas Grandes, Baca could nonetheless obtain possession if he paid the settlers for their improvements, and they would then be given substitute lands. *Id.*

The Senate Committee on Private Land Claims recognized the indemnity given to Baca was not charity, but an obligatory recognition of Mexican law and custom, noting the proposed resolution "[w]ould have undoubtedly been acceded to by Mexico if the territory had remained hers, and to whose rights and *duties* the United States have succeeded." A-227, 232-233; *see also United States v. Redondo Dev't Co.*, 254 F. 656, 659 (8th Cir. 1918) (the Baca floats were "not a largess or bounty to the Baca heirs, but a right founded on treaty obligations recognized by Congress").

The confirmation to the Baca heirs was again acknowledged by Congress in the Act of June 11, 1864, Ch. 123, 13 Stat. 125 (the "1864 Act"), A-238-239, which amended the 1860 Act to enable the heirs of Baca to relocate one of the five square tracts "*confirmed to them by said Act.*" [Emphasis supplied.] The Colorado Supreme Court disregarded three separate references in the 1864 Act to a located Baca float as "confirmed," by suggesting that only the Baca claims to the Vegas Grandes were confirmed. In the 1864 Act, however, Congress was referring specifically to the lands selected by the Baca heirs

upon which to locate portions of their floating grant. There is no ambiguity whatsoever in the legislative language, and the located floating grants were indeed "confirmed." Even as recently as 1990, Congress referred to a Baca grant as a "large Spanish land grant." A-240, 254. The Colorado Supreme Court improperly held that Congress did not mean what it said when it used the words "confirmed" and "Spanish land grant." *See Maese v. Herman*, 183 U.S. 572 (1902).

Colorado's refusal to treat the Baca Grant 4 as a confirmed Hispanic grant effectively disenfranchises numerous Colorado citizens who rely upon three centuries of Hispanic law, custom and usage to define their rights. Reopening the conclusive determinations of Congress to challenge and diminish established Hispanic rights exposes the owners of 35.85 million acres in the Southwest to the frustration of legitimate expectations concerning issues settled long ago. It matters not whether states reject the substantive rights guaranteed to successors in interest to Hispanic grants, or refuse to recognize conclusive determinations that the grants are confirmed and entitled to Treaty protection. Either way, the rights are disregarded.

C. At a Minimum, AWD's Rights Arise by United States' Grant.

The Colorado Supreme Court concluded the Baca heirs received title to the Baca Grant 4, not under an Hispanic grant, but simply as a grant from the public domain. The court then held the Baca heirs received no rights to water by U.S. grant, because grants of federal lands carry with them no water rights. This analysis ignores that Congress meant to place the Baca heirs in a

position of *equality* vis-a-vis their interest in the Vegas Grandes. Section 6 of the 1860 Act used the stronger operative word "equal" rather than the weaker word "equivalent" contained in the Senate Committee Report. Compare A-236 with A-233. Congress' intent to satisfy the Treaty by maintaining equality for the Baca heirs could only have been accomplished by recognizing in them the same bundle of rights they would have secured under Hispanic law.

Congress even reserved specific lands to accomplish its end. The holding that water does not follow land in federal grants ignored both general case law and the special facts of this case. Under the Colorado Supreme Court's own analysis, the United States, as the successor to the original sovereigns, was free to dispose of land and water together or separately. *State Dept. of Natural Resources v. Southwestern Colo. Wtr. Cons. Dist.*, 671 P.2d 1294, 1306 (Colo. 1983). In *United States v. City and County of Denver*, 656 P.2d 1 (Colo. 1982), the court itself recognized the *validity of implied water rights* on federal reservations based upon original land ownership by the federal government. As explained above, even if the Baca grant is not recognized as a cession directly from Spain and Mexico, it was created out of lands *reserved* by Congress in § 8 of the 1860 Act in discharge of its Treaty obligations. Those substantive Treaty obligations strengthen, rather than weaken, AWD's equities.

The Act of 1860 was passed to enforce the Treaty and its interpretation requires consideration of the intent of Mexico, not just the intent of the United States. *Absentee Shawnee Tribe of Indians v. Kansas*, 862 F.2d 1415 (10th Cir. 1988). Mexico intended to protect the rights of its citizens

in the property being ceded. Colorado's narrow construction of the grant, and broad construction of the waiver of site priority, violates Mexico's intent under the Treaty, and further violates the principal that an act of Congress ought never to be construed to violate the law of nations if any other construction remains. *The Charming Betsy*, 6 U.S. (2 Cranch) 64, 67 (1804).

In short, AWD's claims were derived from Hispanic law, were confirmed by Congress, and were not subject to diminishment by the Colorado courts. The summary dismissal of the Land Grant Claims was incorrect. Reversal and remand are required to determine the nature and extent of AWD's rights under Hispanic law.

II. AWD WAS DEPRIVED OF DUE PROCESS BY THE MONETARY JUDGMENT AWARDED TO "OBJECTORS" WHO VOLUNTARILY ENTERED AWD'S WATER PROCEEDINGS BECAUSE AWD NEVER HAD A FULL AND FAIR OPPORTUNITY TO CONTEST THEIR ENTITLEMENT TO THE AWARD, AND UNDER COLORADO LAW THE OBJECTORS NEVER HAD TO SATISFY ANY STANDING REQUIREMENTS.

Due Process protects those who suffer from unpopularity as well as those who purport to be more "politically correct." The case of the politically-unpopular AWD implicates the most fundamental purpose of the Constitution: to put the brakes on political excess. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 1-7 (1978). For however much the Objectors may have been acting within their statutory rights in opposing AWD in its water court proceedings, it is "fundamentally unfair" for AWD to have to pay for their admittedly political efforts.

In *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130 (1992), this Court held Congress cannot constitutionally relieve voluntary litigants from having to comply with traditional standing requirements. Just as Colorado's legislature has done in water cases, *see* COLO. REV. STAT. § 37-92-302(1)(b) (1993), Congress had attempted to allow "any person" to litigate certain environmental claims without having to show "injury in fact." This Court held that "ignoring the concrete injury requirement . . . would be discarding a principle fundamental to the separate and distinct constitutional role" of courts. 112 S. Ct. at 2144-45; *see also Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979) (Congress cannot "abrogate" the constitutional "minima" when it comes to standing).

The public's interest in water and environmental matters simply cannot, according to this Court, "be converted into an individual right by a statute . . . that permits all citizens (or, for that matter, a subclass of citizens who suffer no distinctive concrete harm)" to present their claims in litigation. 112 S. Ct. at 2145. The issue is not merely quantitative, as the Colorado Supreme Court's opinion in this case suggests. A-69; 874 P.2d at 381. No one denies the Objectors spent a lot of money pursuing their political agenda; they had every right to tax themselves, assess themselves, and incur indebtedness in doing so. The issue, rather, as this Court recognizes, is qualitative in nature: whether the person who voluntarily comes before the judiciary suffers some direct, discrete injury or is merely asserting he suffers in some indefinite way in common with other people generally. 112 S.Ct. at 2142-46.

The water court's award of $2.7 million to the Objectors strays further from these fundamental principles

than the constitution permits. Not only were the Objectors allowed to insert themselves voluntarily into AWD's case under a statute that opens the courthouse door to "any person" without regard for the dictates of standing, but they were also rewarded for their political efforts with a massive monetary judgment. Federalism may tolerate the former, but due process cannot tolerate the latter. It's one thing to invite the Objectors to contest AWD's application under a statute that exercises the State's prerogative to relax standing requirements in its courts. *See, e.g., Pennell v. City of San Jose*, 485 U.S. 1, 8 (1988); *Asarco Inc. v. Kadish*, 490 U.S. 605, 617 (1989). But it's quite another to take the next step and force AWD to pay for the Objectors' efforts, especially since those efforts went beyond seeking a favorable outcome in the adjudication. *See, e.g., Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 276 (1856) (the government is not free to make any process "due process of law" by its mere will); *Twining v. New Jersey*, 211 U.S. 78, 106 (1908) (due process prohibits procedures that abridge any fundamental principle of justice).

Despite the unprecedented nature of the award against AWD, the Colorado Supreme Court nevertheless failed to even directly address AWD's standing and due process arguments. A-68-69; 874 P.2d at 381. That failure was inconsistent with Colorado's announced reliance upon this Court's precedent in implementing the state's own standing requirements. *See, e.g., Wimberly v. Ettenberg*, 570 P.2d 535, 538-39 (Colo. 1977); *General Assembly v. Lamm*, 700 P.2d 508, 516 (Colo. 1985) ("the requirement of an injury in fact is of constitutional dimension"). But whether or not Colorado courts were willing to address AWD's constitutional concerns, it is the role of *this* Court

to assure "that state courts will not be the final arbiters of important issues under the federal constitution." *Minnesota v. National Tea Co.*, 309 U.S. 551, 557 (1940).

This Court must insure that the judgment conforms with constitutional requirements, for it is the constitutional dimension of standing and its nexus with the demands of due process that have been ignored in this case. The essence of due process is "fundamental fairness." *See, e.g., Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 364 (1985) (fundamental fairness is the "touchstone" of due process); *Quill Corp. v. North Dakota*, 112 S.Ct. 1904, 1913 (1992) ("due process centrally concerns the fundamental fairness of governmental activity"). And it is fundamentally unfair to award attorneys fees and costs in favor of voluntary litigants who are not required to satisfy the most basic, fundamental requirements of standing. Efforts by Colorado's legislature to allow "any person" to avoid those requirements in water cases, and the willingness of Colorado's courts in this case to award vast monetary sums to those who have thus avoided such requirements, cannot withstand due process scrutiny.

Standing's relationship to federal separation of powers doctrine does not preclude relief for AWD. Federal "case or controversy" concepts may not apply to impose federal standing requirements upon Colorado's courts, but that does not mean due process does not operate to impose "fundamental fairness" upon the state's judicial decision-making. The necessity of standing, which is fundamentally a test of basic adversariness, should thus be viewed as a rudimentary component of due process, where, as in this case, a litigant voluntarily

enters court, assumes the role of an adversary, and seeks judicial redress.

Imposition of standing requirements as a component of due process is consistent with the notion that problems typically analyzed in terms of separation of powers might also properly be viewed in light of due process. Professor Davis demonstrated two decades ago that due process often overlaps the separation of powers in the analysis of non-delegation problems. *See* K.C. DAVIS, ADMINISTRATIVE LAW TEXT § 2.09 (1972). Similarly, the concepts of "standing and the right to intervene tend to be governed by the same considerations." *Id.* at § 8.09, p. 206. Since AWD never named the Objectors as parties to its proceedings, they stand in the shoes of intervenors in the classic sense, and so the analysis returns, again, to standing and its absence as a requirement in Colorado water cases.

Like many administrative and specialized tribunals, Colorado's water courts suffer from schizophrenia. "Any person" is invited into the proceedings, and this implies a broad, policy-oriented political process like rule-making or legislation, where a person is free to assert political interests that are not legally differentiated from those of others at large. At the same time, the water court is charged with the task of adjudication, and adjudication by its nature implies the reasoned resolution of particularized disputes between real parties in interest, the ordering of the specific rights and obligations of those parties, and the granting of actual relief in the resolution of those disputes and the ordering of those rights.

In *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 87 (1982), this Court struck down the specialized tribunals established by the Bankruptcy

Reform Act because they exercised the "essential attributes of the judicial power" in the ordering of private rights between private parties. Empowering a tribunal that was not truly a "court" to make binding and enforceable awards of money between private parties based upon their private legal rights was not constitutional. *Id.* at 84-87.

In AWD's case, a similar problem is presented: the award by a specialized tribunal of money to putative parties that were not truly litigants. Under Colorado's statutes, the Objectors entered AWD's proceedings as members of the public at large. Under the water court's judgment, they left the proceedings as private victors, with a huge award of AWD's money in their pockets.

AWD had no control over who chose to be Objectors or the size of the money award granted to them. The "expert emeritus" in this case, A-365, testified that much of the work done by the Objectors may have been appropriate "in a[n] area-wide political context of fighting an appropriation, but not in the adjudication process." A-366. As implied by *Northern Pipeline*, and stated by this "expert emeritus," AWD should not be required to pay for the Objectors' political agenda.[3]

The State of Colorado may be free, as a matter of policy, to allow "any person" to have a public say in water cases, but it is not free, as a matter of due process, to allow the water court to order private awards of money in favor of those who have never had to satisfy

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[3] The key differences between standing in cases involving public issues and standing in cases involving the private rights of private parties were explained in Rudolph & Rudolph, *Standing: A Legal Process Approach*, 36 SW. L.J. 857 (1982).

the basic tests of adversariness. When a specialized tribunal orders a party to transfer $2.7 million of its property to others, the proceedings must conform with the basic concept of adjudication as the resolution of particular disputes between specific parties who are truly *legal* adversaries.

Even if, however, the award to the Objectors did not violate due process because they never had to satisfy any standing requirements, then nevertheless due process was still violated because AWD was never afforded a full and fair opportunity to contest the Objectors' entitlement to the award. Despite repeated requests by AWD for a due process hearing on the panoply of entitlement issues, the water court consistently refused to hold such a hearing. A-121; A-127; A-129. AWD's efforts to raise its due process concerns went down, in the court's words, "in blazing technicolor." A-119-120.

This colorful rhetoric may have won popular acceptance for the court in the politically-charged atmosphere of AWD's proceedings, but it hardly responded to the applicant's rights. Even the timing of the court's rulings suggested a conscious willingness to run rough-shod over those rights. Under the federal cases upon which the water court relied, a litigant who seeks to withdraw a claim is given a choice between taking a dismissal without prejudice, which requires the litigant to accept the "terms and conditions" imposed by the court in exchange for the dismissal being without prejudice, or, if those "terms and conditions" are deemed to be too onerous by the litigant, taking instead a dismissal with prejudice, in which case the litigant escapes the "terms and conditions" but suffers the res judicata effect of the judgment. *See, e.g., Yoffee v. Keller Indus., Inc.*, 580 F.2d 127, 131 n.13

(5th Cir. 1978); *Radiant Tech. Corp. v. Electrovert USA Corp.*, 122 F.R.D. 201, 205 (N.D. Tex. 1988). No such choice was given to AWD, since the amount of the award was not fixed until after the trial from which AWD withdrew its Tributary Claim.

AWD avoided the inefficiencies of proceeding to trial on a claim upon which it knew it could not prevail upon the state of the record. It never accepted, nor was it even given an opportunity to accept or reject, the water court's unprecedented award of massive attorneys fees and costs in favor of the Objectors. No hearing was held to determine their entitlement to such an unusual award. Never were the Objectors required to satisfy the most basic requirements of standing. The $2.7 million judgment against AWD in this context violates the Due Process Clause.

CONCLUSION

For the reasons stated, this Court should grant AWD's Petition so Colorado's refusals to enforce federal treaty and constitutional law may be remedied.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1994

AMERICAN WATER DEVELOPMENT, INC.,
a Colorado corporation,

Petitioner,

v.

CITY OF ALAMOSA, et al.,

Respondents.

Petition For Writ Of Certiorari
To The Colorado Supreme Court

APPENDIX TO PETITION FOR WRIT OF CERTIORARI
VOLUME I
(Pages A-1 through A-269)

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AMERICAN WATER DEVELOPMENT, INC., a Colorado corporation, Applicant-Appellant

v.

CITY OF ALAMOSA; County of Alamosa; Alexander Ranch; Darell Keith Alexander; Richard Angell; Baca Grande Water & Sanitation District; Fred Bauder; Harold L. Bennett; Richard Blumenhein; Bonanza Road Water Users, Owners and Objectors; Lena C. Chiles; Floyd D. Chiles; Terry R. Chiles; Cyril Clayton; Dave Collins; David P. Collins; Barbara J. Collins; Colorado Division of Wildlife; Colorado Water Conservation Board; Columbine Telephone Company; Conejos Water Conservancy District; Concerned Citizens of Crestone, Colorado and Vicinity; Richard E. Conour; Elizabeth A. Conour; Cotton Creek Ranch; Town of Crestone; Fred J. Davie; Douglas M. Davie; Michael R. Dennet; Tom Enos; Dennis L. Felmlee; Oliver Powell Roemer, III, Successor Trustee Under the Trusts Under the Will of Avis Neal Roemer; First Pegasus Corporation; Freel Ranch; Eugene W. Freel; Beverly Freel; Harold L. Freel; Terry Lee Freel; Fullenwider Ranch, Inc.; Ernest Lamar Goodwin; Haidakhandi Universal Ashram; Ernest T. Harer; Grace Harer; Richard W. Hanby; Pamyla Hill; D. Robin Hood; Town of Hooper; J. Richard Johnston; Marty A. Johnston; L.D. Ranch; Town of Lajara; Henry R. Lamm; Mable A.

Lamm; John N. Lawrence; KSD, Ltd.; Lazy KV Estates Homeowners Association, Inc.; Timothy N. Lovato; Lori S. Lovato; Marold Ranches; R.G. Marold; Barbara Mertian; A & M Farms; Pamela Bertin; Phillip Briscoe; Debra Briscoe; Eddie Clayton; Wayne C. Davis; Maggi Dessain; Margarita Diaz; Melvin E. Getz; Julie Goodnight; Greg Gosar; Margaret N. Herzfield; Maggie Houston-Smith; Pamela L. Lunt; Phil Martinez; Messick Farms; Richard A. Messick; Douglas G. Messick; Richard L. Messick; Sandra J. Murray; Curtis W. Nelson; Anne Silver Philleo; Robert S. Philleo; Marlene L. Pruitt; Robert A. Ress; Toni G. Romero; Marianne Sandstrom; Robert W. Simpson; W.E. Sisemote; C. Kimberly Snider; Francis E. Snider; M. Catherine Snider; Shella Snider; Katherine Steichen; Harvey V. Sullivan; Liz Washburn; John R. Wright; George Whitten, Jr.; Donald E. Whitten; Karen Whitten; Betty L. Worley; Town of Moffat; Town of Monte Vista; Jimmy R. Moore; Mary Moore; Morfitt Brothers Farm, Inc.; Darrel Neese; Harold Neese; Gayle A. Nichols; Edward R. Oliver; Otaka International; Robert A. Owens; Edwin Pace; Howard E. Platz; Rio Grande County Commissioners; Rio Grande County Farm Bureau; Rio Grande Water Conservation District; Rio Grande Water Users Association; Rito Alto and San Luis Ranches, Inc.; Rito Alto Ranch, Inc.; Rito Alto Ranchers; Arthur L. Rivale; Ileen J. Rivale; Rocky Mountain Bison, Inc.; Thomas C. Sanderson; County of Saguache; Town of Saguache; San Luis Valley Irrigation Well Owners, Inc.; San Luis Valley Water Conservancy District; Loren R. Santisteven; Julie A. Santisteven; Neil F. Seitz;

Valley View Hot Springs; Martin T. Shellabarger; Patricia Shellabarger; Kenneth L. Skoglund; Mary F. Skoglund; Spiritual Life Institute of America, Inc.; David G. Stagner; Jeris A. Danielson, State Engineer; Steven E. Vandiver, Division Engineer; Travelers Insurance Company; Thomas F. Trim; Annabelle R. Trim; United States of America; Villa Grove Area Water Users, Owners and Opposers; Wagner Ranch, Ltd.; John H. Wagner; Weiss Ranches, Inc.; A.L. Wood; John M. Woodard; Erwin Young; Lynne Young, Objectors-Appellees.

AMERICAN WATER DEVELOPMENT, INC., a Colorado corporation,
Applicant-Petitioner,

v.

RIO GRANDE WATER CONSERVATION DISTRICT; San Luis Valley Irrigation Well Owners, Inc.; The City of Alamosa; The Town of Monte Vista; The Town of LaJara; The Town of Crestone; Saguache County; Alamosa County; Rio Grande County; Rio Grande Water Users Association; San Luis Valley Water Conservancy District; United States of America; State of Colorado; Colorado Division of Wildlife; Colorado Water Conservation Board; Jeris A. Danielson, State Engineer; Steven E. Vandiver, Division Engineer; Conejos Water Conservancy District; Oasis Land & Cattle Corp.; Oliver Powell Roemer, III, Successor Trustee Under the Trusts Under the Will of Avis Neal Roemer; Howard Platz; and Gayle Nichols, Objectors-Respondents.

AMERICAN WATER DEV. v. CITY OF ALAMOSA
Cite as 874 P.2d 352 (Colo. 1994)
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Justice LOHR delivered the Opinion of the Court.

American Water Development, Inc. appeals from a judgment of the District Court for Water Division 3 denying its application with respect to water rights for the production of 200,000 acre feet of water per year by proposed wells in the San Luis Valley of Colorado and from a later judgment of that same court awarding attorney fees, expenses, and costs to certain objectors who successfully opposed the application. We consolidated these cases for all purposes on appeal[1] and now affirm both judgments.

I. *Procedural History and Issues Presented*

On December 31, 1986, American Water Development, Inc. ("AWDI") filed an "Application For Underground Water Rights Or, In The Alternative, For The Determination Of Rights To Nontributary Groundwater

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[1] For purposes of clarity and simplicity we have listed the cases separately in the caption of this opinion.

Outside Of Designated Groundwater Basins" in the District Court for Water Division 3.[2] Statements of opposition were filed by numerous objectors.[3] After several years of discovery and motion practice, AWDI filed an amended application with leave of the court on August 31, 1990.[4] The statements of opposition to the original application were deemed to apply to the amended application, and additional statements of opposition were filed.

In the original application, AWDI sought to establish the right to withdraw 200,000 acre-feet of ground water per year from proposed wells to be located on lands owned or claimed by the applicant and containing more

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[2] The Baca Ranch Company and The Baca Corporation were co-applicants with AWDI in the original application. AWDI is the sole applicant in the amended application, referred to herein, and we make no further reference to the other applicants even when discussing the original application.

[3] The objectors who participated in the trial and are appearing on this appeal are the United States of America; the State of Colorado; Rio Grande Water Conservation District; Rio Grande Water Users Association; San Luis Valley Water Conservancy District; Conejos Water Conservancy District; Oasis Land and Cattle Company; Oliver Powell Roemer III, Trustee; Howard R. Platz; and Fred Bauder. These objectors acted in various combinations in filing and briefing motions in the trial court and in examining witnesses and presenting nontestimonial evidence during pretrial hearings and at trial. For simplicity we refer in most instances in this opinion to actions taken by "the objectors" without specifying the particular objectors or noting that others did not join.

[4] Shortly thereafter, the court permitted the substitution of an exhibit to the amended application, reflecting more current information on replacement water rights.

than 100,000 acres in the Closed Basin drainage of the San Luis Valley in south-central Colorado (sometimes, "the Valley").[5] The lands are made up of two noncontiguous parcels. The smaller parcel contains approximately 4,683 acres and is situated in the vicinity of the Town of Villa Grove in the northeastern part of the Valley. The larger parcel consists of Baca Grant No. 4 and adjacent lands, located approximately twenty miles to the south of Villa Grove. The original application proposed the use of 112 wells, 2,500 feet deep and perforated between the depths of 200 and 2,500 feet. Most of the wells were to be located on Baca Grant No. 4.

In its original application, AWDI asserted four alternative claims: (1) a claim for determination of a right to nontributary ground water pursuant to section 37-90-137(4), 15 C.R.S. (1990), subject to adjudication under section 37-92-203(1), 15 C.R.S. (1990), (2) a claim to water underlying Baca Grant No. 4 under Spanish and Mexican law and the 1848 Treaty of Guadalupe Hidalgo between the United States and Mexico, (3) a claim to water underlying Baca Grant No. 4 under the Act of June 21, 1860, Ch. 167, 12 Stat. 71 (1860), pursuant to which AWDI's predecessors acquired that tract from the United

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[5] A general description of the geographic, geologic, and hydrologic features of the San Luis Valley and of the history of water usage and the legal structure governing such usage within the Valley is set forth in *Alamosa-LaJara Water Users Protection Ass'n v. Gould*, 674 P.2d 914, 916-20 (Colo.1983). Appendix A to that case is a map of the Valley. *Id.* at 937. A description of the features of the Closed Basin appears in *Closed Basin Landowners Ass'n v. Rio Grande Water Cons. Dist.*, 734 P.2d 627, 629 (Colo.1987).

States,[6] and (4) a claim for determination of a water right for tributary ground water.

The amended application proposed implementation of pumping in phases, changed the number and location of wells (approximately 117 to be located on Baca Grant No. 4, and 15 to be located on AWDI's property near Villa Grove) and added a fifth claim pertaining to determination of injury from AWDI's proposed withdrawals and a proposal of methods to remedy any such injury by a plan for augmentation and other protective measures.

The original application indicated an intent to apply the water to various beneficial uses including agricultural use within the Valley. The amended application made clear for the first time that AWDI proposed to use some of the water outside of San Luis Valley along the Front Range within the State of Colorado.

As the case progressed, the parties attempted to narrow the issues by motions for partial summary judgment. These included a motion by the objectors to dismiss the land grant claims. On July 5, 1990, the court granted partial summary judgment dismissing those claims.

A pretrial conference was held on September 26, 1991. Near the conclusion of the pretrial conference, and without prior notice, AWDI tendered a written motion to dismiss its fourth claim – for determination of a water right for tributary ground water. The objectors argued that dismissal would prejudice them unless the dismissal

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[6] We sometimes refer to the second and third claims jointly as the land grant claims.

order included appropriate terms and conditions, including provision for payment of their attorney fees, expenses, and costs for preparing to defend against the tributary claim. At a second pretrial conference, the court granted the motion to dismiss, without prejudice, but imposed the condition that AWDI pay to the objectors their reasonable attorney fees, expenses, and costs in opposing the tributary and related claims. The court reserved determination of the amount of such award for later proceedings.

Before the second pretrial conference, the State of Colorado, one of the objectors, moved that the trial be bifurcated if the trial court should dismiss the tributary claim. By this motion, the state sought to defer consideration of issues of injury and proposed remedies, as presented by the fifth claim, until after the trial court's determination of rights to nontributary ground water. The court granted that motion to bifurcate, and the case proceeded to trial on the nontributary claim alone.

Following a trial that began on October 15 and concluded on November 22, 1991, the court denied and dismissed the application, based on its determination that the ground water that AWDI sought to withdraw is tributary to natural streams, and entered judgment accordingly. Thereafter, the court held an evidentiary hearing with respect to the costs, expenses, and attorney fees to be awarded as provided in the condition included in the earlier order dismissing the tributary claim. Based on evidence presented at that hearing, the court issued a judgment awarding ten named objectors specified amounts of attorney fees, expenses, and costs totaling $2,709,881.70. AWDI appealed each of the judgments to

this court,[7] and we granted a motion to consolidate the cases for all purposes.

In this appeal, AWDI assigns the following errors, as set forth in its briefs in the sequence here presented: (1) the trial court's case management order and its implementation prejudiced AWDI, and the trial court's rulings were not objective; (2) the trial court erred in its order awarding fees and costs under C.R.C.P. 41(a)(2) and 54(d); (3) the trial court erred in its pretrial partial summary judgment rulings (a) dismissing the land grant claims, (b) precluding examination of the Closed Basin Project's[8] means of diversion, and (c) holding that legislation classifying certain stream systems as natural streams subject to appropriation did not violate the prohibition of special legislation under Article V, Section 25, of the Colorado Constitution; (4) the trial court erred in rejecting AWDI's claim for determination of a right to nontributary ground water; (5) the trial court failed to identify relevant existing aquifer conditions; and (6) the

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[7] We have jurisdiction over these cases by virtue of Colo. Const. art VI, § 2, and § 13-4-102(1)(d), 6A C.R.S. (1987), which statutorily excludes from the court of appeals' jurisdiction appeals from final judgments of district courts in "[w]ater cases involving priorities or adjudications." *See also* C.A.R. 1(a)(2).

AWDI is designated as Applicant-*Petitioner* in case no. 92SA263, involving the judgment for attorney fees, expenses, and costs, because it filed a notice of appeal in the Colorado Court of Appeals as well as in this court and asked that we accept certiorari under C.A.R. 50 in the event that we deemed the court of appeals to have jurisdiction over the appeal. We accepted jurisdiction on direct appeal.

[8] *See infra* at 372-373.

trial court incorporated excessive and unwarranted findings in its order dismissing AWDI's amended application.

We first address the challenged partial summary judgment rulings on the land grant claims (Issue 3(a)), then the combination of issues concerning rejection of AWDI's nontributary ground water right claim (Issues 3(b) and (c), 4, and 5), next the issues concerning the case management order and the objectivity of the trial court's rulings (Issue 1), then whether the trial court's findings were excessive and unwarranted (Issue 6), and finally the challenge to the award of attorney fees, expenses, and costs (Issue 2).

II. *Dismissal of the Land Grant Claims*

The trial court granted the objectors' motions for partial summary judgment dismissing AWDI's claims of rights to ground water based on Spanish and Mexican law as recognized and affirmed by the United States or, in the alternative, on an absolute grant of title by the United States.[9] These claims, in essence, are that by reason of the manner in which AWDI's predecessor obtained title to Baca Grant No. 4, all right to underground water, whether tributary or not, underlying that tract were acquired by the original grantee and were later conveyed to AWDI.

Standards governing appropriateness of summary judgment are well settled. Where there is no genuine

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[9] These claims relate only to Baca Grant No. 4 and do not apply to the adjacent lands or to the smaller parcel in the vicinity of Villa Grove.

issue of any material fact and the moving party is entitled to judgment as a matter of law, summary judgment is warranted. C.R.C.P. 56; *Greenberg v. Perkins*, 845 P.2d 530, 531 (Colo.1993); *Churchey v. Adolph Coors Co.*, 759 P.2d 1336, 1339-40 (Colo.1988); *Pueblo W. Metro. Dist. v. S.E. Colo. Water Cons. Dist.*, 689 P.2d 594, 600 (Colo.1984). It is the burden of the moving party to demonstrate the absence of a triable factual issue, and any doubts as to the existence of such an issue must be resolved against that party. *Greenberg*, 845 P.2d at 531; *Elm Distrib., Inc. v. Tri-Centennial Corp.*, 768 P.2d 215, 218 (Colo.1989). Although the party resisting summary judgment is entitled to the benefit of all favorable inferences that may be drawn from the facts presented, the moving party's request must be granted where the facts are undisputed and the opposing party cannot prevail as a matter of law. *Greenberg*, 845 P.2d at 531; *see Kaiser Foundation Health Plan of Colo. v. Sharp*, 741 P.2d 714, 719 (Colo.1987).

Applying these principles to the present case, we conclude that the record demonstrates that there is no genuine issue of material fact. The facts concerning the manner in which title passed into private ownership are undisputed. It is only the legal effect of the relevant events and documents that is at issue. Our task, therefore, is to determine whether the record supports the entry of partial summary judgment in favor of the objectors as a matter of law. We begin by presenting the salient facts that formed the basis of the trial court's decision.

A. *Factual Background*

In 1821, Luis Maria Cabeza de Baca, on behalf of himself and a number of his male children, petitioned Mexican governmental authorities for the grant of a tract of land containing nearly 500,000 acres[10] and known as the Vegas Grandes in the vicinity of the present day city of Las Vegas, New Mexico. H.R.Exec.Doc. No. 14, 36th Cong., 1st Sess. at 3 (1860) (hereinafter, "H.R.Exec.Doc. No. 14"). The tract was granted to Baca,[11] who settled on the land, remained for some time, and then left. *See id.* at 3-4. In 1835, certain other persons petitioned Mexican governmental authorities for the same land, and the petition was granted shortly thereafter with the proviso that persons who owned no land were to be permitted the same privilege of settling upon the grant as the persons who had petitioned. *Id.* at 44. Thereafter, several hundred families settled on the grant. *See* S.Rep. No. 228, 36th Cong., 1st Sess. at 3 (1860) (hereinafter, "S.Rep. No. 228").

In 1848, the United States and the Republic of Mexico entered into the Treaty of Guadalupe Hidalgo, ending hostilities between the two nations. Treaty of Peace, Friendship, Limits, and Settlement With The Republic of Mexico, Feb. 2, 1848, U.S. – Mex., 9 Stat. 922. Under

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[10] *See Lane v. Watts*, 234 U.S. 525, 527, 34 S.Ct. 965, 967, 58 L.Ed. 1440 (1914).

[11] Mexico achieved independence from Spain in 1821. *See* Henry B. Parkes, *A History of Mexico* 170-72 (Houghton Mifflin 1988). The grant to Baca was made by the provincial deputation of Durango on May 29, 1821, and was later ratified and confirmed in February 1825 by the departmental assembly of New Mexico, then a province of the Republic of Mexico. *See* S.Rep. No. 228, 36th Cong., 1st Sess. at 3 (1860).

Article V of the treaty, Mexico ceded certain lands to the United States. 9 Stat. at 926-28. Included within them was the Vegas Grandes. Article VIII of the treaty required the United States to respect the property of Mexican citizens in the ceded lands. 9 Stat. at 929-30.[12]

In order to establish a process for determination of land claims within the portion of the ceded lands relevant here, Congress passed the Act of July 22, 1854, Ch. 103, 10 Stat. 308 (1854). Pursuant to that act, the surveyor general of the Territory of New Mexico, within which the Vegas Grandes was situated, was given the duty "to ascertain the origin, nature, character, and extent of all claims to lands under the laws, usages, and customs of Spain and Mexico" and to report to Congress on the validity of such claims so that Congress could take "such action thereon as may be deemed just and proper, with a view to confirm *bona fide* grants, and give full effect to the treaty of eighteen hundred and forty-eight between the United States and Mexico. . . . " *Id.* § 8 at 309. On December 18, 1858, the surveyor general issued his report with respect to the claims of the heirs of Baca and of the town of Las Vegas to the Vegas Grandes. He concluded

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[12] Article VIII of the treaty of Guadalupe Hidalgo provided, in relevant part:

> In [the territory in question], property of every kind, now belonging to Mexicans not established there, shall be inviolably respected. The present owners, the heirs of these, and all Mexicans who may hereafter acquire said property by contract, shall enjoy with respect to it guaranties equally ample as if the same belonged to citizens of the United States.

9 Stat. at 929-30.

> that the land embraced in either of the two grants is lawfully separated from the public domain and entirely beyond the disposal of the general government, and that in the absence of the one the other would be a good and valid grant; but as this office has no power to decide between conflicting parties, they are referred to the proper tribunals of the country for the adjudication of their respective claims, and the case is hereby respectfully referred to Congress through the proper channel for its action in the premises.

H.R. Exec.Doc. No. 14 at 45.

On May 19, 1860, the United States Senate Committee on Private Land Claims issued its report. It determined that the grant to Baca and his sons "is a genuine and valid title," and that later, on a petition that represented the land to be public, the same land was granted to the predecessors of the town of Las Vegas, the persons presenting the petition were put in possession, "and several hundred families are located on it." S.Rep. No. 228 at 3. The report noted that the surveyor general "has recommended the confirmation of both these titles, leaving to the respective claimants the right of adjusting their conflicting claims in the courts." *Id.* at 3-4. The report observed, however, that "the plunging of an entire settlement of families into litigation, at the imminent hazard of being turned out of their homes, or made to purchase a second time, from a private owner, lands for which they paid their government a full equivalent, in the labor, risk, and exposure by which they have converted a wilderness, surrounded by hostile savages, into a civilized and thriving settlement" would be a disastrous result. *Id.* at 4. It

then stated that an alternative involving "little loss or cost to the government," *id.*, was available:

> The claimants under the title to Baca, . . . represented by . . . counsel, have expressed a willingness to waive their older title in favor of the settlers, if allowed to enter an equivalent quantity of land elsewhere within the Territory; and your committee cannot doubt that Congress will cheerfully accept the proposal, which, indeed, would undoubtedly have been acceded to by Mexico if the Territory had remained hers, and to whose rights and duties the United States have succeeded.

Id.

Congress acted by adopting the Act of June 21, 1860, Ch. 167, 12 Stat. 71 (1860), confirming, among others, claim number 20, which embraced the competing claims of the Baca heirs and the town of Las Vegas[13] to the Vegas

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[13] The competing claims were included within claim 20 in the surveyor general's report. Claim 20 was among the claims confirmed, "as recommended for confirmation by said surveyor-general in his reports," by section 3 of the Act of June 21, 1860. We use the term "confirmed" with respect to each of these competing claims even though Congress clearly recognized the conflict between them and provided a means for its resolution. Congress undoubtedly meant no more than to acknowledge and approve the surveyor general's conclusion that in the absence of either claim the other would be a good and valid grant. *See* Senate Rep. No. 228 at 3-4. ("The surveyor general having none but ministerial duties to perform, has recommended the confirmation of both these titles, leaving to the respective claimants the right of adjusting their conflicting claims in the courts."); *see also Lane v. Watts*, 234 U.S. at 528, 34 S.Ct. at 968 (referring to both grants as "confirmed"); *but see*

Grandes, and making the following provision for the heirs of Baca:

> That it shall be lawful for the heirs of Luis Maria Baca, who make claim to the said tract of land as is claimed by the town of Las Begas [sic], to select instead of the land claimed by them, an equal quantity of vacant land, not mineral, in the Territory of New Mexico, to be located by them in square bodies, not exceeding five in number. And it shall be the duty of the surveyor-general of New Mexico, to make survey and location of the lands so selected by said heirs of Baca when thereunto required by them: *Provided, however,* That the right hereby granted to said heirs of Baca shall continue in force during three years from the passage of this act, and no longer.

Act of June 21, 1860, § 6, 12 Stat. 71, 72 (1860). As the United States Supreme Court characterized it, "Congress accommodated the dispute by a magnificent donation of lands to the heirs of Baca, and confirmed the original land to the town. . . . " *Maese v. Herman,* 183 U.S. 572, 581, 22 S.Ct. 91, 95, 46 L.Ed. 335 (1902).[14] Such a determination

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Shaw v. Kellogg, 170 U.S. 312, 342, 18 S.Ct. 632, 644, 42 L.Ed. 1050 (1898) (speaking of the claim of the heirs of Baca to the Vegas Grandes, the court said, "Here there had been no claim confirmed to any tract of land but only the grant of a right to locate.")

[14] In *Maese,* the United States Supreme Court further noted, [W]e can easily see that Congress might have exercised its bounty to adjust a controversy to which a town was a party,

and resolution of claims arising under a treaty was within the province of Congress. *See United States v. Sandoval*, 167 U.S. 278, 290, 17 S.Ct. 868, 872-73, 42 L.Ed. 168 (1897); *Tameling v. U.S. Freehold & Emigration Co.*, 93 U.S. 644, 661, 23 L.Ed. 998 (1876); *Sanchez v. Taylor*, 377 F.2d 733, 737 (10th Cir.1967).

What followed is detailed in *Shaw v. Kellogg*, 170 U.S. 312, 18 S.Ct. 632, 42 L.Ed. 1050 (1898). The surveyor general of the Territory of New Mexico was directed by proper federal authority to survey the Vegas Grandes to determine the area of the grant, whereupon the Baca heirs would have the right to select an equal quantity of vacant, nonmineral land in the Territory of New Mexico in square parcels not to exceed five. *Id.* at 314, 18 S.Ct. at 633. The Baca heirs selected the Baca Grant No. 4 as one of the parcels. *Id.* at 315, 18 S.Ct. at 633-34. Prior to such selection, the Territory of Colorado had been organized, Act of February 28, 1861, ch. 59, 12 Stat. 172 (1861), and the area embraced within Baca Grant No. 4 was included within the boundaries of the newly formed territory. *See Shaw*, 170 U.S. at 316, 18 S.Ct. at 634. Following investigation and survey, the Colorado surveyor general approved the field notes, survey, and plat of Baca Grant No. 4. *See id.* at 314-25, 18 S.Ct. at 633-38. Upon such approval, in 1864 title passed pursuant to the Act of June 21, 1860, without the necessity for issuance of a patent. *Id.* at 342-43, 18 S.Ct. at 644-45. AWDI must predicate its land

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when, if the contestants were individuals, they would have been remitted to the courts to litigate their rights and priorities. *Maese*, 183 U.S. at 581, 22 S.Ct. at 95.

grant claims on the foregoing facts. We now turn to an analysis of those claims.

B. *The Spanish and Mexican Land Grant Claim*

AWDI first asserts that its title to Baca Grant No. 4 is derived from a Spanish or Mexican grant[15] and has all the attributes of such a grant, allegedly including transfer of all underground water, whether tributary or nontributary, underlying the granted lands. AWDI asserts that recognition of the Spanish or Mexican origin of its title is necessary in order to honor the requirement of the Treaty of Guadalupe Hidalgo that the United States respect the property rights of Mexican citizens.

"[I]ndividual rights of property, in the territory acquired by the United States from Mexico, were not affected by the change of sovereignty and jurisdiction." *Tameling*, 93 U.S. at 661. "The duty of providing the mode of securing them and fulfilling the obligations which the treaty of cession imposed, was within the appropriate province of the political department of the government." *Id.* Congress provided the necessary procedures by adopting the Act of July 22, 1854. Congress committed to the surveyor general of the Territory of New Mexico the duty of ascertaining the origin, nature, character and

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[15] As previously noted, Mexico achieved independence from Spain in 1821. That was the year in which Baca petitioned for the grant of Vegas Grandes. It is unimportant to the resolution of the issues before us whether title to Vegas Grandes was derived under Spanish law, Mexican law, or some combination of the two.

extent and determining the validity of all such claims in the Territory. *Tameling*, 93 U.S. at 662. The final action on each claim was reserved to Congress and not subject to judicial review. *Id.*

The land comprising Baca Grant No. 4 was never in the private domain before it was granted to the Baca heirs pursuant to the Act of June 21, 1860. It was in territory under the sovereignty of Spain and then the Republic of Mexico prior to the Treaty of Guadalupe Hidalgo. Under that treaty the United States acquired sovereignty and the land became part of the public domain.[16] In order to resolve amicably the disputed claims to the Vegas Grandes, which was a completely different tract located in what is now the State of New Mexico, the Baca heirs, one of two sets of claimants to that latter tract, offered to "waive their older title in favor of" the other group of claimants "if allowed to enter an equivalent quantity of land elsewhere within the Territory." S.Rep. No. 228 at 4.[17] The Act of June 21, 1860, followed, in which the

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[16] In *Ely Real Estate & Investment Co. v. Watts*, 262 F. 721, 721 (9th Cir.1920), *cert. denied*, 255 U.S. 564, 41 S.Ct. 374, 65 L.Ed. 788 (1921), the court referred to the effect of the Act of June 21, 1860, as "granting to the heirs of Luis Maria Cabeza de Baca the right to select lands *in the public domain* in lieu of the Las Vegas grant, which they claimed to own." (Emphasis added). *See Lane v. Watts*, 234 U.S. at 539-40, 34 S.Ct. at 972 (Baca Grant No. 3 was segregated from public domain); *Kellogg*, 170 U.S. at 338, 343, 18 S.Ct. at 643, 645 (Baca Grant No. 4 was segregated from public domain).

[17] *See Lane v. Watts*, 234 U.S. at 541-42, 34 S.Ct. at 973 ("To accommodate conflicting claims and at the instance of the Government the Baca claimants gave up their rights to a definite tract of land, and . . . the Government therefore would naturally

United States Congress accepted the offer of the heirs of Baca and allowed them "to select instead of the land claimed by them, an equal quantity of vacant land,[18] not mineral, in the Territory of New Mexico." The heirs of Baca did select such land, part of which was Baca Grant No. 4, and obtained title from the United States by following the procedures prescribed by the Act of June 21, 1860. The result was a grant of lands in which no private rights had ever been recognized under the laws of Spain or Mexico and a waiver of a claim to other lands under which such rights could have been asserted by the claimants. *See Wise v. Watts*, 239 F. 207, 225-27 (9th Cir.1917), *cert. denied*, 244 U.S. 661, 37 S.Ct. 745, 61 L.Ed. 1376 (1917) (discussing title to Baca Grant No. 3, obtained under the same circumstances as Baca Grant No. 4).

The grant of lands, including Baca Grant No. 4, not subject to rights under the laws of Spain and Mexico in return for such waiver was not an abrogation of treaty rights as AWDI contends, but rather a resolution of competing claims well within the ambit of congressional authority. *See Sandoval*, 167 U.S. at 290, 17 S.Ct. at 873 ("The mode in which private rights of property may be secured, and the obligations imposed upon the United States, by treaties, fulfilled, belongs to the political

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make provision for the location of the substituted land as expeditiously as possible and without expense to the Baca heirs").

[18] "Vacant land" necessarily referred to land not subject to "claims to lands under the laws, usages, and customs of Spain and Mexico," for lands in the latter category previously had been withdrawn from disposal pending final action by Congress on such claims. Act of July 22, 1854, § 8, 10 Stat. at 308, 309.

department of the government to provide."); *Tameling*, 93 U.S. at 661. The Act of June 21, 1860, itself contains no suggestion that the grant of Baca Grant No. 4 involved any intent to create rights other than those incident to any conveyance of lands from the public domain of the United States to a private citizen. *Cf. United States v. Roselius*, 56 U.S. (15 How.) 31, 34, 14 L.Ed. 587 (1853) (confirmation of doubtful claim by Congress on certain terms and acceptance of those terms by claimant adjusts the claim on the footing of compromise and forecloses judicial review).

AWDI argues, however, that references by Congress to "confirmation" of the claim of the Baca heirs to the Vegas Grandes reflect an intent that the rights acquired by the Baca heirs in the substituted lands, including Baca Grant No. 4, were the same rights incident to their claim under Spanish or Mexican law to the Vegas Grandes. This argument is not well taken. The surveyor general of the United States did indeed recommend that the title of the Baca heirs to the Vegas Grandes be confirmed and the disputes between the two sets of claimants be resolved in court. Instead, however, pursuant to agreement, the Baca heirs waived that title in return for the right to obtain other lands from the United States. The surveyor general's recommended confirmation of the original title and Congress's ensuing confirmation of claim 20 both related to rights in the Vegas Grandes but suggested nothing about the nature of the title to be acquired from the

United States by a compromise grant of other lands in that sovereign's public domain.[19]

AWDI also relies on case authority to support its argument that title to the alternative selected lands does not lose its original character as derived under the laws of Spain or Mexico. AWDI refres us to *Henshaw v. Bissell*, 85 U.S. (18 Wall.) 255, 21 L.Ed. 835 *Board of County Comm'rs of County of Pueblo v. Central Colo. Improvement Co.*, 2 Colo. 628 (1874) (*Nolan I*); *rev'd by Central Colo. Improvement Co. v. Board of Comm'rs*, 95 U.S. 259, 24 L.Ed. 495 (1877) (*Nolan II*). *Henshaw* referred to Mexican law in part to determine the better title under conflicting United States patents issued upon a confirmation of grants made by the Mexican government as floating grants within a general tract large enough to satisfy both. *Nolan I* and *Nolan II* establish that when a Mexican land grant is

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[19] AWDI in its reply brief in this court also refers to the use of the term "confirmation" in the Act of June 11, 1864, Ch. 123, 13 Stat. 125 (1864), which provides for selection of substitute lands by the Baca heirs for one of the parcels selected by them under the Act of June 21, 1860. The Act of June 11, 1864, refers to the lands first selected by the Baca heirs as "bodies of land confirmed to them" by the 1860 act, then refers to one of the substitute parcels as "confirmed to said heirs as aforesaid," and finally refers to the selection of substitute lands under the Act of June 11, 1864, as "confirmed to the said heirs of the said Luis Maria Baca." AWDI argues that the language of confirmation supports its argument that title to the substitute tracts is derived under Spanish or Mexican law. As previously noted, however, it was the claim of the Baca heirs to the Vegas Grandes that was confirmed, and that claim was waived in order to resolve a conflicting claim by the Town of Las Vegas. We are unable to ascribe to the general references to confirmation in the Act of June 11, 1864, the significance attached to them by AWDI.

confirmed to less than all of the lands located within the boundaries of the original grant, title relates back to and is grounded upon the laws of Mexico. In the present case, the claim confirmed to the Baca heirs was their claim to the Vegas Grandes. The Baca heirs waived that claim and accepted a grant from the United States to public domain lands not within the boundaries of any Mexican land grant. Neither *Henshaw* nor the opinions in *Nolan I* and *Nolan II* speak to this issue. For the reasons previously expressed, we hold that title to the Baca Grant No. 4 did not derive from the Mexican government or its Spanish predecessor.[20]

C. *The Claim Under the Act of June 21, 1860*

AWDI asserts a supplemental or alternative claim to ownership of all ground water underlying Baca Grant

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[20] AWDI also notes that "Baca Location No. 1," one of the five parcels selected by the Baca heirs under the Act of June 21, 1860, was referred to as a "Spanish Land Grant" in House and Senate reports concerning legislation on land exchanges in 1990. *See* H.R.Rep. No. 783, 101st Cong., 2d Sess., pt. 1, at 3 (1990), Legislative History of Baca Location No. 1 Land Acquisition and Study Act of 1990, Pub.L. No. 101-556, 104 Stat. 2762 (1990). Certainly, rights to the parcels selected by the Baca heirs arose indirectly from Spanish or Mexican land grants for the Vegas Grandes and the resolution of conflicting claims to the Vegas Grandes under such grants. Under these circumstances we attach no weighty significance to the references to "Baca Location No. 1" as a Spanish Land Grant in the legislative reports.

Furthermore, because title to the Baca Grant No. 4 is not based on confirmation of a Spanish or Mexican grant of such lands, we need not and do not express any opinion on the incidents of title that is so based.

No. 4 based on the language of the Act of June 21, 1860. As earlier discussed, section 3 of that Act "confirmed" certain private land claims in the Territory of New Mexico, including the competing claims of the Baca heirs and the Town of Las Vegas to the Vegas Grandes, as recommended for confirmation by the surveyor general. In section 4 of the Act, Congress provided "[t]hat the foregoing confirmation shall only be construed as quit-claims or relinquishments, on the part of the United States, and shall not affect the adverse rights of any other person or persons whomsoever." AWDI relies on this language of quit claim or relinquishment as conveying to the Baca heirs all rights of the United States in the lands selected by them in return for waiver of their claim to the Vegas Grandes. Such rights, according to this argument, included all rights to water underlying Baca Grant No. 4.

As earlier noted, however, the Act of June 21, 1860, did not confirm a claim of the Baca heirs to Baca Grant No. 4. They had no such claim. Instead, pursuant to section 6 of that Act and the legislation previously discussed, the Baca heirs were authorized to select alternative lands not within the boundary of the Vegas Grandes in return for waiver of their claim to the Vegas Grandes. Section 4 of the Act, quit claiming or relinquishing rights of the United States to confirmed claims, had no application to the substitute lands. AWDI's reliance on *Henshaw v. Bissell*, 85 U.S. (18 Wall.) 255, 21 L.Ed. 835 (1873), and language in *Shaw v. Kellogg*, 170 U.S. 312, 331, 18 S.Ct. 632, 640, 42 L.Ed. 1050 (1898), is misplaced. Those cases contain language supporting the proposition that confirmation of claims under the Act of June 21, 1860, effected relinquishment of all rights of the United States to the

premises covered by the claims. This proposition, based on section 4 of the Act, has no application to the substitute lands in the public domain, including Baca Grant No. 4, selected by the Baca heirs in return for waiver of their claim to the Vegas Grandes, the tract to which their claim pertained.

Principles of construction militate against AWDI's arguments as well. Land grants are construed favorably to the United States government, and nothing passes except what is conveyed in clear and explicit language. *Watt v. Western Nuclear, Inc.*, 462 U.S. 36, 59, 103 S.Ct. 2218, 2231, 76 L.Ed.2d 400 (1983) (lands acquired under Stock Raising Homestead Act of 1916 do not include gravel deposits); *Andrus v. Charlestone Stone Prod. Co.*, 436 U.S. 604, 617, 98 S.Ct. 2002, 2009-10, 56 L.Ed.2d 570 (1978) (water is not a valuable mineral subject to location under Federal Mining Law of 1872); *United States v. Union Pac. R.R. Co.*, 353 U.S. 112, 116, 77 S.Ct. 685, 687, 1 L.Ed.2d 693 (1957) (right of way granted to railroad did not include mineral rights); *Caldwell v. United States*, 250 U.S. 14, 20-21, 39 S.Ct. 397, 398-99, 63 L.Ed. 816 (1919) (right granted by statute to railroad to take timber necessary for construction did not extend to "tie slash" – tops of trees not usable for making ties). Any doubts are to be resolved in favor of the government and not against it, *Western Nuclear, Inc.*, 462 U.S. at 59, 103 S.Ct. at 2231; *Andrus*, 436 U.S. at 617, 98 S.Ct. at 2009-10; *United States v. Union Pac.*, 353 U.S. at 116, 77 S.Ct. at 687; *Caldwell*, 250 U.S. at 20-21, 39 S.Ct. at 398-99, as are any inferences, *Caldwell*, 250 U.S. at 20, 39 S.Ct. at 398. The rule of narrow construction of federal land grants has been applied with particular vigor with respect to water where determination that a grant

carries rights to water would create inconsistencies with the water right system that has been based on local law and custom. *See Andrus*, 436 U.S. at 615-17, 98 S.Ct. at 2008-10.[21]

Nothing in the Act of June 21, 1860, suggests that the land to be received by the Baca heirs by selection from the public domain in exchange for relinquishment of their claim under Spanish or Mexican law to the Vegas Grandes was to have any incidents peculiar to claims

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[21] AWDI contends that local law and custom governed the extent of water rights appurtenant to lands conveyed by the United States when the Baca heirs obtained title to Baca Grant No. 4 in 1864. *See generally California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 154-55, 55 S.Ct. 725, 727-28, 79 L.Ed. 1356 (1935); *State v. S.W. Colo. Water Cons. Dist.*, 671 P.2d 1294, 1304-07 (Colo. 1983) *cert. denied, Young v. S.W. Colo. Water Cons. Dist.*, 466 U.S. 944, 104 S.Ct. 1929, 80 L.Ed.2d 474 (1984). AWDI argues that local law and custom in the San Luis Valley at the relevant time presents a genuine issue of material fact precluding summary judgment. As we recognized in *Coffin v. Left Hand Ditch Co.*, 6 Colo. 443, 446 (1882), however, the doctrine of priority of appropriation with respect to tributary water governed in Colorado "from the date of the earliest appropriations of water within the boundaries of the state."

We believe that at least after Colorado was organized as a territory on February 28, 1861, the proper inquiry concerning local law and custom is to be made on a territory-wide basis. The use of the term "law" indicates that we should look to the body empowered to make law – here the territorial legislature – and suggests that "custom" should be examined within that same territorial compass. *Coffin* therefore controls, and we find it unnecessary to inquire into the possibility of differing custom in particular parts of the territory or state.

derived under the law of those sovereigns. The Act contains no mention whatsoever of rights to water underlying the lands to be selected.[22] There is no basis in the Act of June 21, 1860, to support a construction that the baca heirs acquired any rights that would have been recognized under Spanish or Mexican law to substituted lands selected by them in return for waiver of their claim to the Vegas Grandes.[23]

We hold that AWDI's argument that it acquired rights to water underlying Baca Grant No. 4 based on the terms of the Act of June 21, 1860, is not well founded.

III. *Challenges to the Determination that Water Sought to be Withdrawn is Tributary*

At the time of trial, AWDI's sole remaining claim for a right to withdraw 200,000 acre feet of water annually from wells on lands owned or claimed by it was contained in that part of its amended application seeking a determination of rights to nontributary ground water under section 37-92-203(1), 15 C.R.S. (1990). The trial

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[22] For general principles concerning the interrelation of federal and state law concerning acquisition of rights to water, *see, e.g., S.W. Colo. Water cons. Dist.*, 671 P.2d at 1304-18; *United States v. City and County of Denver*, 656 P.2d 1 (Colo.1983); *Coffin*, 6 Colo. 443.

[23] For the foregoing reasons, we also are unpersuaded by AWDI's suggestion that by reason of the obligations of the United States under the Treaty of Guadalupe Hidalgo and by an attempted analogy to the doctrine of federal reserved water rights, *see United States v. City and County of Denver*, 656 P.2d 1, the Baca heirs were granted by implication a right to water underlying Baca Grant No. 4.

court determined that the water did not meet the statutory definition of nontributary ground water in section 37-90-103(10.5), 15 C.R.S. (1990), and therefore denied the claim. The court found that the water was tributary not by a mere preponderance of the evidence but "beyond a reasonable doubt."[24]

Section 37-90-103(10.5) defines nontributary ground water, in relevant part, as follows:

> 'Nontributary Ground Water' means that ground water, located outside that boundaries of any designated ground water basins[25] in existence on January 1, 1985, the withdrawal of which will not, within one hundred years, deplete the flow of a natural stream, including a natural stream as defined in sections 37-82-101(2) and 37-92-102(1)(b), at an annual rate greater than one-tenth of one percent of the annual rate of withdrawal. The determination of whether ground water is nontributary shall be based on aquifer conditions existing at the time of permit application. . . .

Based on this definition, the water sought by AWDI was nontributary ground water only if within one hundred years the withdrawal at the rate of 200,000 acre feet per year would not deplete the flow of a natural stream at an annual rate of one-tenth of one percent of that amount, or

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[24] The state engineer had issued a determination pursuant to § 37-92-302(2), 15 C.R.S. (1993 Supp.), that the water was tributary, and the trial court took note of the rebuttable presumption created by that determination. *See* § 37-92-305(6), 15 C.R.S. (1993 Supp.).

[25] The ground water at issue is located outside the boundary of any designated ground water basins.

200 acre feet per annum. The trial court found that the effect of the withdrawals on three sets of natural streams would exceed the statutory standard. First, the court found that depletion to the surface flows of the Rio Grande River and San Luis Creek alone would be approximately 7,400 acre feet per annum. Second, the court found that depletions of approximately 3,600 acre feet per annum would result to the surface flow of Big Spring Creek and that depletions to many other streams in the Closed Basin would occur in amounts not quantified by the evidence. Additionally, the trial court found that there would also be depletions to the Closed basin's unconfined aquifer, which the court concluded to be part of the water of a natural stream. We first address the findings concerning the effect of AWDI's proposed pumping on surface streams and then the issues relating to the effect on the unconfined aquifer.[26] We conclude this section by

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[26] AWDI's theory of nontributariness was premised principally on several related contentions, all of which were properly rejected by the trial court. First, it argued that whether ground water is nontributary is to be determined solely by reference to the effect of pumping on the surface flow of natural streams without regard to the effect on ground water tributary to such streams. Second, it contended that there was no significant hydraulic connection between the surface streams in the Closed Basin and the underlying aquifers so that depletion of the unconfined aquifer would not deplete the surface flow or cause greater loss through streambed leakage than would otherwise occur. AWDI also contended that the streams in the Closed Basin lose their character as natural streams when they reach the Closed Basin. As discussed herein, the trial court rejected these premises based on determinations of fact from conflicting evidence, correct rulings on the law, or a combination of the two.

considering AWDI's challenge to the partial summary judgment order precluding it from challenging the means of diversion of the Closed Basin Project.

A. *Whether the Trial Court Properly Determined the Effect of AWDI's Proposed Pumping on Surface Streams*

The trial court's determinations of the effects of the proposed withdrawals on the Rio Grande River, San Luis Creek, Big Spring Creek, and other surface streams are findings of fact. As such, they will not be disturbed on appeal unless wholly unsupported by the evidence. *Board of County Comm'rs v. Upper Gunnison River Water Cons. Dist.*, 838 P.2d 840, 847 (Colo.1992); *People v. City of Thornton*, 775 P.2d 11, 19 (Colo.1989).

The trial court was presented with extensive evidence, through expert testimony and voluminous exhibits, concerning the geological and hydrologic characteristics of the Valley and of the Closed Basin in particular. The evidence established, and the trial court found, that underlying the lands in the Valley are two aquifers having different hydrologic properties and generally acting as separate hydrologic units. Separating them is a group of clay layers referred to as the blue clay series. The upper aquifer, called the unconfined aquifer, consists of coarse materials with relatively high hydraulic conductivities, and is situated above the blue clays, which range in depth from 35 feet on the west side of the Valley to 125 feet on the east. Most of the irrigation wells in the Valley

are completed in this aquifer.[27] The lower aquifer is located below the blue clays. Although hydrologically connected at various points, the two aquifers have been separately administered by the state engineer for well permit purposes. The extent of the hydraulic connection is sufficiently slight that water in the confined aquifer is maintained under artesian pressure. The artesian condition results from a recharge of the confined aquifer by waters entering the aquifer at higher elevations at the edges of the Valley and the limited permeability of the blue clays separating the two aquifers.

The evidence concerning the effects to be produced by AWDI's proposed withdrawals of water was sharply conflicting in many respects. Each side attempted to develop a comprehensive geologic and hydrologic framework for use in predicting the movement of water within the San Luis Valley as a result of such withdrawals. For this purpose AWDI and the objectors utilized complex ground water flow computer models, the objectors' model having been developed by the Colorado state engineer. By introducing into the models certain data as described to the court through expert testimony, each side attempted to demonstrate the effect of the proposed withdrawals on surface streams and the unconfined aquifer.

In general, the court found the evidence presented by the objectors had utilized in operating their computer

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[27] AWDI's proposed wells are to be perforated at depths between 200 and 2,500 feet and therefore are to be completed in the lower, confined aquifer.

model more credible than that of AWDI.[28] In particular, the court made the critical finding that the ground water in the unconfined aquifer "is in hydraulic connection with most surface streams in the San Luis Valley and their alluvium for all or portions of most years."[29] As a result, the level of the water table in the unconfined aquifer influences gain or loss to the streams. On another critical factual issue, the trial court found that the values used by AWDI for streambed conductance, which expresses the rate at which a stream will lose water to the underlying aquifer, were not credible; AWDI's data greatly underestimated loss of water through streambed leakage. The court also found that AWDI's evapotranspiration data and use of that data in its computer model materially overstated the potential for reducing loss of water by evapotranspiration by lowering the water table through pumping and thus eliminating vegetation. These are examples of some of the more important factual findings that undermined the credibility of the results predicted by the use of AWDI's computer model.

The trial court also found that the State's model was originally created for administrative purposes and was "far more extensive and thorough" than that of AWDI. The court found that while not purporting to be able "to

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[28] After an extensive review of the evidence concerning AWDI's computer model and the data used in operating it the trial court found "that the opinions of [AWDI's] experts, based upon its model, are not credible."

[29] AWDI acknowledges that there is a hydraulic connection between the surface streams and the unconfined aquifer with respect to the property near Villa Grove. The issue here relates only to the Baca Grant No. 4 and adjacent lands.

predict with exact precision the quantity and location of stream depletions" to be caused by AWDI's proposed pumping, the State's model was adequate for a determination of whether depletion to certain streams would exceed the statutory standard in the definition of nontributary water. The 7,400 acre feet per annum depletive effect on the Rio Grande River and San Luis Creek was directly predicted by the State's model and provided the basis for the trial court's finding that this effect was inconsistent with the statutory definition of nontributary water.

In addition, the State's model predicted the locations where the water level in the unconfined aquifer would be drawn down by AWDI's proposed pumping. Based on expert testimony that Big Spring Creek was in hydraulic connection with the unconfined aquifer, the computer model prediction that the effect of AWDI's proposed pumping would reduce the water level in that aquifer to a particular extent, and an expert's testimony concerning the effect of such a water level reduction on Big Spring Creek, the trial court found that the creek would be depleted by approximately 3,600 acre feet per year by the proposed pumping, a reduction in itself sufficient to defeat AWDI's claim that the water it sought to withdraw was nontributary. The trial court also found that the lowering of the water level in the unconfined aquifer would adversely affect other natural streams even though such effects could not be precisely quantified because those streams were not included in the computer model.

All of the trial court's findings were based on evidence in the record and will not be overturned. *See, e.g., Upper Gunnison River,* 838 P.2d at 847.

B. *Whether the Trial Court Properly Determined the Nature of the Unconfined Aquifer and the Effect of AWDI's Proposed Pumping on that Aquifer*

The trial court also determined that the unconfined aquifer was part of a natural stream, with the result that the depletive effects of AWDI's proposed withdrawals on that aquifer must be taken into account as well in determining whether the water to be withdrawn is nontributary. We agree.

Under Article XVI, Sections 5 and 6, of the Colorado Constitution, the water of every natural stream is declared to be the property of the public and subject to appropriation for beneficial use. The manner of implementation of that right has been delineated by the Water Right Determination and Administration Act of 1969, §§ 37-92-101 to -602, 15 C.R.S. (1990 & 1993 Supp.), and extensive case law preceding and following that Act. The right to appropriate water of every natural stream extends to waters tributary to a natural surface stream. § 37-92-102, 15 C.R.S. (1990); *State v. S.W. Colo. Water Cons. Dist.*, 671 P.2d 1294, 1308 (Colo.1983); *Whitten v. Coit*, 153 Colo. 157, 385 P.2d 131 (1963).

Nontributary ground water is subject to disposition by the General Assembly in exercise of its plenary power to develop a system of law governing acquisition of rights in this resource. *See S.W. Colo. Water Cons. Dist.*, 671 P.2d at 1304-18 (describing interrelation of federal and state law concerning the acquisition of rights to water). In exercise of that power, the General Assembly has provided for judicial determination of rights to nontributary ground water outside of designated ground

water basins, § 37-92-203(1), 15 C.R.S. (1990), and has established standards and procedures concerning acquisition of such rights, § 37-90-137, 15 C.R.S. (1990 & 1993 Supp.). The right to withdraw nontributary ground water is based on ownership of the overlying land, § 37-90-102(2), 15 C.R.S. (1990); § 37-90-137(4), 15 C.R.S. (1990 & 1993 Supp.), rather than the doctrine of prior appropriation applicable to tributary water.

Because of the two separate systems for acquisition of rights in water in and tributary to natural streams and nontributary ground water it became useful to define the distinction between these two resources. The present case implicates two sets of statutes establishing that distinction. The one is a pair of statutes having particular application to stream systems arising and terminating in Colorado. The other is the statute defining "nontributary ground water."

In 1979, the General Assembly enacted essentially identical statutes,[30] as set forth in Ch. 346, secs. 1, 4, § 37-82-101(2), § 37-92-102(1)(b), 1979 Colo.Sess.Laws 1366, 1366, 1367-68, which provide:

> A stream system which arises as a natural surface stream and, as a natural or man-induced phenomenon, terminates within the state of Colorado through naturally occurring evaporation

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[30] The only difference is that § 37-82-101(2) concludes by reference to "appropriation as provided in subsection (1) of this section," whereas § 37-92-102(1)(b) concludes by reference to "appropriation as provided in paragraph (a) of this subsection (1)." Each of the subsections to which reference is made in turn makes reference to the constitutional right of appropriation, although the language of the subsections is not identical.

> and transpiration of its waters, together with its underflow and tributary waters, is a natural surface stream subject to appropriation. . . .

We sometimes refer to sections 37-82-101(2) and 37-92-102(1)(b) collectively as the "natural surface stream legislation."

In 1985, the General Assembly adopted the definition of nontributary ground water in effect at the time AWDI asserted its claim and continuing to the present. § 37-90-103(10.5), 15 C.R.S. (1990). That statute appears earlier in this opinion at page 34 and specifically includes the natural streams defined in the natural surface stream legislation among the natural streams to be considered in applying the statutory test.

Relying on the definition of "natural surface stream" adopted in the natural surface stream legislation, which includes underflow and tributary waters, the trial court found the streams flowing into the Closed Basin and the unconfined aquifer into which those streams flow to be natural streams. AWDI argues, first, that the natural surface stream legislation is special legislation prohibited by Article V, Section 25, of the Colorado Constitution. AWDI also asserts that the unconfined aquifer is not part of a natural stream within the meaning of the statute defining nontributary ground water. In any event, AWDI argues, the trial court's conclusion that the water AWDI seeks to withdraw does not satisfy the statutory standard for nontributary ground water cannot be sustained because the court made no findings concerning relevant aquifer conditions existing at the time of the permit application, as is necessary to apply the definition of nontributary ground

water under section 37-10-103(10.5). We address these issues in the order stated.

1. *Challenge to Natural Stream Legislation as Special Legislation*

AWDI argues that the trial court erred in granting the objectors' motion for partial summary judgment declaring the natural surface stream legislation to be consistent with the constitutional prohibition of special legislation. AWDI contends, as it did before the trial court, that sections 37-82-101(2) and 37-92-102(1)(b), 15 C.R.S. (1990), constitute special legislation in violation of Article V, Section 25, of the Colorado Constitution. It asserts that these two statutes constitute special legislation because they apply only to stream systems in the Closed Basin and were intended to preclude the factual determination as to nontributariness that would otherwise be necessary in determining whether ground water in that basin is subject to the doctrine of prior appropriation applicable to tributary water rather than to allocation by landownership, the statutory basis for allocating nontributary ground water outside designated ground water basins. *See* § 37-90-102(2), 15 C.R.S. (1990); § 37-90-137(4), 15 C.R.S. (1990 & 1993 Supp.).

Article V, Section 25, of the Colorado Constitution prohibits the General Assembly from enacting special legislation. The relevant portion of Article V, Section 25, states simply, "where a general law can be made

applicable no special law shall be enacted."[31] As we stated in *Curtiss v. GSX Corp. of Colorado*, 774 P.2d 873 (Colo. 1989),

> [t]his constitutional prohibition is directed at "legislation that applies to some classes but not to others without a reasonable basis for distinguishing between them, or legislation that exempts some members of a class from coverage [of the general law] without a reasonable basis for the exemption."

Id. at 876 (quoting *City of Montrose v. Public Utilities Comm'n*, 732 P.2d 1181, 1190 (Colo.1987)). A law does not violate the constitutional prohibition against special legislation if it is "general and uniform in its operation upon all in like situation." *Curtiss*, 774 P.2d at 876, (quoting *McCarty v. Goldstein*, 151 Colo. 154, 158, 376 P.2d 691, 692-93 (1962)); *Rifle Potato Growers Ass'n v. Smith*, 78 Colo. 171, 176, 240 P. 937, 939 (1925); *People v. Earl*, 42 Colo. 238, 264, 94 P. 294, 302 (1908).

The statutes in question here provide that stream systems that terminate in Colorado are natural surface streams subject to appropriation. We regard this simply as recognition that such stream systems are natural streams within the meaning of Article XVI, Sections 5 and 6, of the Colorado Constitution and therefore subject to the constitutional right of appropriation. The legislature had a reasonable basis to address this particular class of

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[31] Article V, Section 25, of the Colorado Constitution, also specifically prohibits special laws in twenty-two express categories, none of which is applicable here.

streams and clarify the manner of obtaining rights to water in such stream systems.

The statutes satisfy the requirement that they be general and of uniform application. By their terms they apply to all stream systems in the state of Colorado that arise as natural surface streams and terminate in Colorado. The statutes are not limited to apply only to specific streams or specific geographic areas. When adopting the legislation, the legislature itself was aware of at least one other area in the state of Colorado to which the statutes would apply. *See* Senate Floor Debate on S.B. 481 (April 25, 1979).

Although the legislature was apparently aware of just two geographic regions that would be affected by the legislation, the number of class members known to be affected by the statutory criteria at the time of enactment is not determinative in deciding whether the legislation amounts to unconstitutional special legislation. In *Darrow v. People*, 8 Colo. 417, 8 P. 661 (1885), we upheld the constitutionality of legislation that created a superior court in any town or city that had more than 25,000 inhabitants, even though Denver was the only city of that size when the legislation was adopted. In *Darrow*, we stated that

> Denver, it is true, is the only city to which the act at present applies. But the legislature clearly intended to provide for places that may hereafter acquire the population mentioned. The law is general, and is unlimited as to time in its operation. There is nothing unreasonable in the supposition that other towns and cities within the

> state will eventually contain twenty-five thousand inhabitants.

Darrow, 8 Colo. at 418-19, 8 P. at 662; *cf. In re Interrogatories*, 146 Colo. 233, 361 P.2d 350 (1961) (a bill authorizing annexation of a town by a city under circumstances unique to one location and providing for automatic repeal of annexation authority shortly after enactment was unconstitutional as special legislation). Like the legislation at issue in *Darrow*, the natural surface stream legislation has an indefinite period of application. Analogous to *Darrow*, there is nothing unreasonable in the supposition that with the development and refinement of knowledge of the geography and hydrology of the state, it may be learned that there are other stream systems that arise as natural surface streams and terminate in Colorado. Therefore, in the future, this legislation may be found to apply to such other streams.

Because the two statutes are of general and uniform applicability, they do not constitute special legislation in violation of Article V, Section 25, of the Colorado Constitution. Accordingly, the trial court's partial summary judgment ruling will be upheld.[32]

2. *Inclusion of Unconfined Aquifer in Definition of Natural Stream*

The trial court concluded as a matter of law that "the unconfined aquifer is water of a natural stream," and that the proposed pumping of 200,000 acre feet per annum

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[32] Summary judgment was consistent with the principles governing the availability of such relief. *See supra* at 360.

would deplete the flow of that stream as well as other natural streams in the San Luis Valley to a greater extent than allowable in order to satisfy the criteria in the definition of nontributary ground water in section 37-90-103(10.5).

AWDI asserts first that the unconfined aquifer is not a natural stream within the meaning of section 37-90-103(10.5) because it does not fit the definition of "natural stream" in section 37-87-102(1)(b), 15 C.R.S. (1990). This argument has no merit.

Section 37-87-102(1)(b) provides:

> *As used in this article,* unless the context otherwise requires:
>
> * * *
>
> (b) "Natural stream" means a place on the surface of the earth where water naturally flows regularly or intermittently with a perceptible current between observable banks, although the location of such banks may vary under different conditions.

(Emphasis added.) The "article" referred to in the foregoing definition is Article 87, entitled "Reservoirs." By its own terms, the definition does not apply to section 37-90-103(10.5), which appears in a separate article 90, captioned "Underground Water." Also, section 37-90-103(10.5) specifically includes within the meaning of "natural stream" "a natural stream as defined in sections 37-82-101(2) and 37-92-102(1)(b)." The trial court found that the unconfined aquifer falls within these definitions as "a stream system which arises as a natural surface stream which terminates within the state,

together with its associated underflow and tributary water."

AWDI also argues that the amount of surface stream depletion alone determines whether water is nontributary within the meaning of section 37-90-103(10.5). This is incorrect. That section specifically refers to sections 37-82-101(2) and 37-92-102(1)(b) as included within the definition of natural streams. Those sections in turn refer to "a natural surface stream . . . together with its underflow and tributary waters." Clearly then, the underflow and tributary waters of streams described in the natural stream legislation are included as part of the natural streams referred to in section 37-90-103(10.5), and the effect on such underflow and tributary waters must be considered in determining whether ground water to be withdrawn is nontributary.

AWDI also challenges factual findings upon which the trial court relied in determining that the unconfined aquifer constitutes associated "underflow and tributary water" of a natural surface stream and therefore by definition is part of the natural surface stream. *See* §§ 37-82-101(2) and 37-92-102(1)(b). Specifically, AWDI contends that its evidence concerning the lack of hydraulic connection between the unconfined aquifer and surface streams was more weighty and credible than that of the objectors. Similarly, AWDI contends that its evidence concerning streambed conductance, which affects the movement of water into and out of the subsurface surrounding a stream is more persuasive. Our review of the record, however, reveals ample evidence supporting the trial court's findings on these matters. Issues of credibility are to be resolved by the trial court. Consequently,

the findings will not be disturbed on appeal. *See Upper Gunnison River,* 838 P.2d at 847.[33]

For the foregoing reasons we uphold the trial court's determination that the unconfined aquifer in the Closed Basin is part of a natural surface stream within the meaning of section 37-90-103(10.5).

3. *Requirement of Determination of Existing Aquifer Conditions at the Time of Permit Application*

Section 37-90-103(10.5) requires that a determination that ground water is nontributary "shall be based on aquifer conditions existing at the time of permit application. . . . " AWDI asserts that the trial court's order is not so based and that therefore the judgment must be reversed and remanded with directions to apply the statutory standard.

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[33] The trial court also found that without regard to the natural stream legislation, the unconfined aquifer is a natural stream within the meaning of the statutory and case law delineating the reach of the constitutional right of appropriation. AWDI has not challenged that analysis except as implicit in its factual challenge to the trial court's finding of a hydraulic connection between the unconfined aquifer and the surface streams. It is therefore unnecessary to address that analysis except to say that we agree that the statutory definition of nontributary ground water must be construed to be exclusive of those waters subject to the constitutional right of appropriation. *See Whitten v. Coit,* 153 Colo. 157, 385 P.2d 131 (1963) (doctrine of prior appropriation is not applicable to underground waters that are not tributary to any natural stream). There is no suggestion that the trial court's construction was not fully consistent with that principle.

AWDI did not present evidence directed at the conditions of the aquifer as they existed in 1986 when AWDI first filed its permit application. Rather, an expert witness for AWDI testified that conditions during the 1970s were representative of conditions at the time of the application. The objectors introduced evidence that conditions in the 1970s were not representative but that such period was untypically dry.[34] The trial court held that it need not resolve this controversy because it was satisfied, applying the statutory standard, "that the ground water sought by [AWDI] is tributary even if the period 1970-1979, or any period thereafter is used."[35] Again, the evidence was conflicting, the court made findings resolving the material conflicts, and therefore the findings of the trial court must be sustained on review.

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[34] The significance of this dispute relates to whether the unconfined acquifer, under "aquifer conditions existing at the time of the permit application" would be and remain in hydraulic connection with the surface streams. Absent such a connection, the unconfined aquifer arguably would not be part of a natural stream and any effect of AWDI's proposed withdrawals on water level in that aquifer would not be relevant to determination of nontributariness as defined in § 37-90-103(10.5).

[35] AWDI also argues that the trial court erred in adopting a speculative value for Closed Basin Project production, rather than the lower amount actually produced during the 1980s, by relying on the State's computer model. As the State points out in its brief, however, the Project is conditionally decreed 117,000 acre feet per year. The State used 75,000 acre feet per year in running its model as an estimate of probable sustained production based on the evidence concerning other constraints on production included in the Closed Basin Project degree. We cannot conclude that the trial court erred in implicitly recognizing that estimated production level as a condition existing at the time of the permit application.

C. *Whether the Trial Court Properly Precluded Challenge to Means of Diversion of Closed Basin Project*

AWDI argues that the trial court erred in granting partial summary judgment precluding AWDI from challenging the reasonableness of the means of diversion of wells producing from the unconfined aquifer on the basis of a water right decreed for the Closed Basin Project. We do not find it necessary to address this question on the merits.

The Closed Basin Project is a federal reclamation project that was authorized by the Reclamation Project Authorization Act of 1972.[36] The project was designed to withdraw water from the unconfined aquifer of the Closed Basin and deliver the water to the Rio Grande River. Under normal conditions, water that flows into the basin is collected in a sump area that is separated from the Rio Grande River drainage by a natural hydraulic barrier at the southern boundary of the Closed Basin. Once trapped there, much of the water is lost to evaporation and evaportranspiration. *See generally Closed Basin Landowners Ass'n v. Rio Grande Water Cons. Dist.*, 734 P.2d 627 (Colo.1987).

> The goal of the Closed Basin project is to lower the water table in the sump area by approximately two feet through the construction and operation of over one-hundred shallow wells, and to reduce water losses to evaporation and evapotranspiration. Water salvaged from the

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[36] Pub.L. No. 92-514, 86 Stat. 964 (1972), *as amended by* Pub.L. No. 96-375, § 6, 94 Stat, 1507 (1980; Pub.L. No. 93-570, 98 Stat. 2941 (1984); and Pub. L. No. 100-516, § 22, 102 Stat. 2566, 2575 (1988).

> sump area is to be delivered to the Rio Grande River to help meet Colorado's obligations to New Mexico and Texas under the Rio Grande Compact. *See* Rio Grande Compact, P.L. No. 96, 53 Stat. 785 (1939); § 37-66-101, 15 C.R.S. (1973).

Id. at 629.

In December of 1972, Rio Grande Water Conservation District, the local sponsoring entity for this federal project applied for determination of a conditional water right. In April 1980, in case W-3038, the District Court for Water Division 3 granted the application and decreed a conditional water right to withdraw 117,000 acre feet of water per year from 129 shallow wells situated on over 100,000 acres of lands. The wells would tap the unconfined aquifer in the Closed Basin. *See generally Closed Basin,* 734 P.2d at 629-31.

In the trial court, AWDI contended that in considering whether the ground water it sought to withdraw by its proposed wells is availble for appropriate under its tributary claim and whether withdrawals would materially injure the vested rights of others, *see* § 37-90-137(2), 15 C.R.S. (1993 Supp.), the court must address whether the Closed Basin wells, which are limited by decree to withdrawals from the unconfined aquifer, constitute a reasonable means of diversion. *See* § 37-92-102(2)(b) 15 C.R.S. (1990); *Alamosa-LaJara,* 674 P.2d at 934-35; *City of Colorado Springs v. Bender,* 148 Colo. 458, 462, 366 P.2d 552, 555 (1961).[37] AWDI's position was that any injury to the

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[37] The reasonable means of diversion issue, as applied to tributary ground water, was first explained in *Bender*:

Closed Basin Project that might otherwise result from AWDI's proposed pumping should be addressed by requiring that the Project wells be deepened to produce water from the confined aquifer. Prior to trial, Rio Grande Water Conservation District moved for partial summary judgment to preclude AWDI from challenging in this proceeding the District's adjudicated water right for the Closed Basin Project. The trial court granted the motion, finding that the doctrine of *res judicata* barred any challenge to the Closed Basin Project decree. The court specifically stated that the applicant was barred from challenging "the reasonableness of the means of diversion established for the well withdrawals decreed in the April 21, 1980 Decree in Case No. W-3038, including the requirement that the depth of the wells be restricted to the unconfined aquifer." On this appeal, AWDI asserts that the court must consider whether the Closed Basin

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> . . . priority of appropriation does not give a right to an inefficient means of diversion, such as a well which reaches to such a shallow depth into the available water supply that a shortage would occur to such senior even though diversion by others did not deplete the stream below, where there would be an adequate supply for the senior's lawful demand.
>
> * * *
>
> The plaintiffs cannot reasonably "command the whole" source of supply merely to facilitate the taking by them of the fraction of the entire flow to which their senior appropriation entitles them. On the other hand, plaintiffs cannot be required to improve their extraction facilities beyond their economic reach, upon a consideration of all the factors involved.

Bender, 148 Colo. at 462, 465, 366 P.2d at 555, 556.

Project's means of diversion is reasonable. We need not reach this question.

The central issue in the case at trial was whether the water sought to be withdrawn was nontributary within the meaning of section 37-90-103(10.5), as claimed by AWDI. Reasonableness of the means of diversion of Closed Basin Project wells had no bearing on that issue, and AWDI did not prevail on its claim. The issue of reasonableness of means of diversion arose in connection with AWDI's tributary claim. AWDI, however, voluntarily dismissed that claim.

In general, a claimant who voluntarily dismisses a claim cannot appeal from the judgment of dismissal, for the judgment cannot be considered adverse as to the one who sought it. *Jensen v. Matthews-Price, M.D.*, 845 P.2d 542, 543 (Colo.App.1991); *accord Unioil, Inc. v. E.F. Hutton & Co., Inc.*, 809 F.2d 548, 555 (9th Cir.1986), *cert. denied*, 484 U.S. 822, 108 S.Ct. 83, 98 L.Ed.2d 45 (1987) & 484 U.S. 823, 108 S.Ct. 85, 98 L.Ed.2d 47 (1987); *LeCompte v. Mr. Chip, Inc.*, 528 F.2d 601, 603 (5th Cir.1976); *see also* 9 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2376 (1971) (hereinafter "Wright & Arthur R. Miller"). And, as the Sixth Circuit Court of Appeals has observed,

> [e]ven in those rare jurisdictions . . . which permit appeal from an order of voluntary nonsuit where there is a ruling of the court which strikes at the heart of the case and precludes recovery by plaintiff, appeal from such order does not lie to review rulings which do not have the effect of determining the case against plaintiff.

Management Investors v. United Mine Workers of Am., 610 F.2d 384, 394 (6th Cir.1979) (quoting *Kelly v. Great Atlantic & Pacific Tea Co.*, 86 F.2d296, 297 (4th Cir.1936)). *Cf. Harrington v. Anderson*, 87 Colo. 417, 419, 288 P. 1049, 1050 (1930) (we will not as a general rule pass on questions not necessary to the decision); *Olney Springs Drainage Dist. v. Auckland*, 83 Colo. 510, 517, 267 P. 605, 608 (1928) (same). We do not regard the reasonable means of diversion issue as one that strikes at the heart of the tributary claim. In view of AWDI's voluntary dismissal of that claim, we hold that the partial summary judgment on the reasonableness of the means of division of the Closed Basin Project wells is not properly reviewable on this appeal.

IV. *Procedural Prejudice*

A. *Whether the Trial Court's Case Management Order and its Implementation Unfairly Prejudiced AWDI*

In May of 1990, three and one-half years after the case was filed the objectors moved for the entry of a case management order that would structure discovery and the pretrial process, including establishment of a discovery schedule and deadlines for amendments to AWDI's water application. In July of 1990 the court entered its case management order. Dates were set before which all motions to amend the application had to be filed, discovery had to be completed, and lists identifying all expected testifying experts, fact witnesses, and exhibits had to be served upon all parties. AWDI was ordered to identify its experts and their proposed testimony as well as its fact witnesses and exhibits before the times the objectors were required to disclose their own witnesses and exhibits.

AWDI now asserts that the case management order and its implementation were unfairly prejudicial. It argues that there was no justification for the requirement that AWDI identify its witnesses and exhibits before the objectors and that this order unfairly enabled the objectors to conduct discovery "before providing reciprocal information." In addition, AWDI maintains that because the trial court allowed the objectors to introduce late-designated evidence, there was "one-sided" enforcement of the order and that AWDI was unfairly afforded "fewer procedural protections" than the objectors.

Generally, pretrial discovery rulings are within the sound discretion of the trial court. *In re Marriage of Mann* 655 P.2d 814, 816 (Colo.1982); *Kerwin v. District Ct.*, 649 P.2d 1086, 1088 (Colo.1982); *Cameron v. District Ct.*, 193 Colo. 286, 289, 565 P.2d 925, 928 (1977); *see also Glisan v. Kurth*, 153 Colo. 102, 107, 384 P.2d 946, 949 (1963) ("to make pre-trial procedure effective, appellate interference with the trial court in this area must be kept at a minimum"). The trial court's decision to prescribe staggered discovery was fully justified by the nature of the issues in this case. AWDI had the burden of proof to establish its alternative claims for tributary or nontributary rights. *See Public Service Co. of Colo. v. Board of Water Works of Pueblo, Colo.*, 831 P.2d 47, 480 (Colo.1992) (relating to tributary application). The central issue was whether the water to be produced was tributary or nontributary. It evaluate the application it was necessary to understand the complex factual framework concerning the geology and hydrology of the Valley, AWDI's computer model, and the data that would be used in running the model upon which AWDI predicated its claim. It was therefore reasonable to

require AWDI to proceed first in order for the objectors to be able to discern the facts AWDI would rely upon to support its application in order to prepare the objectors' own case. Particularly considering the fact that AWDI was allowed to designate rebuttal experts after it had completed discovery from the objectors' expert witnesses, we cannot say that the trial court's decision to compel AWDI to identify its witnesses and exhibits before the objectors was an abuse of discretion.

As for the alleged prejudice to AWDI from the court's "one-sided" implementation of the order, the record does not support this claim. The trial court did modify the management order to allow the objectors to introduce additional evidence, but this evidence did not create unfair surprise. The evidence consisted of another run from a previously introduced computer model showing the predicted results from a particular pumping scenario proposed by AWDI, as well as related testimony, and two demonstrative exhibits that graphically displayed data already available to AWDI. Moreover, the court granted a number of modifications for AWDI itself, including allowing the presentation of rebuttal testimony from a witness not identified until trial was underway.

A trial court has broad discretion in allowing deviations from the terms of pretrial orders. *Murphy v. Colorado Aviation, Inc.*, 41 Colo.App. 237, 241, 588 P.2d 877, 881 (1978); *Impliedly overruled on other grounds by Public Service Co. v. District Ct.*, 674 P.2d 383 (Colo.1984); *see C.K.A. v. M.S.*, 695 P.2d 785, 788 (Colo.App.1984) (trial courts have broad discretion in determining whether to allow late endorsement of witnesses not listed in pretrial

orders).[38] AWDI has not demonstrated that the trial court abused that discretion.

B. *Whether the Trial Court's Rulings were Objective*

AWDI asserts that the trial court's rulings were not properly objective. In support of its position, AWDI cites a number of pretrial motions on which the trial court ruled in favor of the objectors by entering precisely the form of order proposed by them. AWDI also points out that the decree entered by the trial court was virtually identical to the objectors' proposed decree.

Adoption of a prevailing party's proposed findings of fact and conclusions of law is not necessarily improper. "[F]indings, if otherwise sufficient, are not weakened or discredited because given in the form submitted by counsel." *Uptime Corp. v. Colorado Research Corp.*, 161 Colo. 87, 93, 420 P.2d 232, 235 (1966). Even those courts that condemn the uncritical adoption of findings prepared by the

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[38] According to a treatise on the Federal Rules of Civil Procedure:

> "Rule 16, . . . permitting pretrial procedures, can achieve its purpose of improving the quality of justice only if the pretrial requirements entered at the discretion of the trial court are applied with intelligent flexibility, taking into full consideration the exigencies of each situation. The trial judge must be permitted wide latitude in guiding a case through its preparatory stages."

3 James Wm. Moore et al., *Moore's Federal Practice* ¶ 16.19 (2d ed. 1993) (quoting *Davis v. Duplantis*, 448 F.2d 918, 921 (5th Cir.1971)).

prevailing party are unwilling to reverse unless the findings themselves are inadequate. *Id.* at 92, 420 P.2d at 235.

> On appeal, the court will assume that the trial judge examined the proposed findings and agreed that they correctly stated the facts as he himself found them to be; otherwise, he would not have adopted them as his own. It is only when the findings themselves are inadequate and do not indicate the basis for the trial court's decision that the judgment will be reversed.

Id. at 93, 420 P.2d at 235 (citations omitted). The findings are sufficient and indicate the basis for the trial court's decisions. Therefore, they will be sustained despite the fact that the trial judge adopted the language of the prevailing party's proposed findings and conclusions as his own.

V. *Excessive and Unwarranted Findings*

AWDI asserts that the trial court's 104 page Findings of Fact, Conclusions of Law, Judgment and Decree contains "a multitude of findings and conclusions irrelevant to the character of the water [as tributary or nontributary]" and requests that these findings and conclusions be excised from the decree. AWDI expresses concern that some of these findings may have a collateral estoppel effect in the event a tributary claim is reasserted in the future. We believe this concern is ill founded.

Collateral estoppel bars relitigation of an issue only under the following conditions:

> (1) The issue precluded is identical to an issue actually litigated and necessarily adjudicated in the prior proceeding;
>
> (2) the party against whom estoppel is sought was a party to or was in privity with a party to the prior proceeding;
>
> (3) there was a final judgment on the merits in the prior proceeding; and
>
> (4) the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the prior proceeding.

Denver v. Consolidated Ditches Co., 807 P.2d 23, 32 (Colo.1991); *accord, e.g., Pomeroy v. Waitkus*, 183 Colo. 344, 350-51, 517 P.2d 396, 399 (1973). To the extent that any of the findings and conclusions of the trial court were not necessarily adjudicated or actually litigated under circumstances where AWDI had a "full and fair opportunity to litigate," they can have no collateral estoppel effect. Once the tributary claim had been dismissed and the injury and mitigation issues eliminated by bifurcation, the issues necessarily adjudicated were those required for determination of whether the water sought to be withdrawn met the statutory definition of nontributary ground water. Therefore, to the extent the trial court's findings and conclusions go beyond those necessary for such a determination, they can have no collateral estoppel effect in future litigation. Under these circumstances, we consider it unnecessary to make a determination of which, if any, of the findings and conclusions are not necessary or to excise any such findings or conclusions from the Findings of Fact, Conclusions of Law, Judgment and Decree.

VI. *Awards of Attorney Fees, Expenses, and Costs*

Having rejected AWDI's objections to the merits of the trial court's judgment, we now turn to AWDI's objection to the awards of attorney fees, expenses, and costs. A summary of the proceedings leading up to the awards is necessary to an understanding of AWDI's objections.

On September 26, 1991, almost five years after AWDI filed its application and following extensive discovery conducted by both AWDI and the objectors, a pretrial conference was held in preparation for a trial scheduled to begin on October 15, 1991. Prior to the pretrial conference, AWDI's land grant claims had been dismissed by partial summary judgment. As a result, AWDI's alternative claims for nontributary and tributary water rights were the only remaining bases for its asserted right to withdraw 200,000 acre feet of water per year by its proposed wells. Near the conclusion of the pretrial conference and without prior notice to the objectors, AWDI moved to dismiss, without prejudice, its application for determination of tributary water rights, taking the position that as a result of the trial court's rulings in this action, and other circumstances, it no longer had a "reasonable likelihood of prevailing on the claim." The objectors sought and were granted the opportunity to respond. In briefs, they took the position that if the court exercised its discretion to dismiss under C.R.C.P. 41(a)(2), the order of dismissal must be conditioned upon the award of all fees and expenses incurred by the objectors in defending against the tributary claim. The court held a nonevidentiary hearing and thereafter entered a written order dismissing the tributary claim without prejudice but

requiring AWDI to pay to the objectors "all of their attorneys' fees, expert witness fees and costs, and other fees and expenses related to the Tributary Claim." The court ordered that a hearing to determine the amounts to be awarded would be held immediately following the trial on the nontributary claim, at which time the court would "consider the reasonableness of those fees and costs and the necessity of those expenditures."

Following the trial and resulting dismissal of the nontributary claim, the objectors sought recovery of attorney fees, expenses, and costs pursuant to the order dismissing the tributary claim under C.R.C.P. 41(a)(2) and also sought costs under C.R.C.P. 54(d) incident to the judgment of dismissal of the nontributary claim. AWDI opposed the requested awards. The court then held a three day evidentiary hearing to determine the amounts to be awarded to the objectors. At the conclusion of the hearing the court made findings and entered a judgment for the objectors in amounts totaling $2,236,790.40 for attorney fees, expenses including expert witness fees, and costs incurred in defending against the tributary claim, as well as $473,091.31 for other costs incident to the litigation resulting in dismissal of the nontributary claim.[39]

AWDI challenges the awards on several bases. First, it asserts that a court cannot condition voluntary dismissal of a claim on the payment of attorney fees, expenses, and costs under C.R.C.P. 41(a)(2), for to do so would violate section 13-17-102(5), 6A C.R.S. (1987), and

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[39] The court detailed the nature and amounts of the awards to each of the individual objectors who received such awards.

C.R.C.P. 11. Second, AWDI argues that because of the unique nature of water adjudication and based upon Colorado Uniform Water Court Rule 5(b), Rule 41(a)(2) is not applicable to litigation concerning water rights. Third, AWDI contends that the awards were improper and excessive because the court employed an incorrect standard in evaluating the C.R.C.P. 41(a)(2) claims, and the evidence adduced in support of those claims was legally insufficient. Finally, AWDI challenges the amount of the costs awarded to the objectors under C.R.C.P. 54(d) as an abuse of discretion, lacking in sufficient evidentiary support, and not based on sufficient findings.

The objectors assert that AWDI cannot contest the awards made under C.R.C.P. 41(a)(2) because they were ordered incident to the dismissal of the tributary claim, which AWDI requested. We first address this threshold issue and then consider AWDI's objections to the awards.

A. *Whether AWDI can Contest the Conditions of Dismissal of the Tributary Claim*

The objectors contend that having asked for and enjoyed the benefit of voluntary dismissal without prejudice, AWDI cannot now be heard to complain about the terms imposed as a condition of the dismissal by the court. The terms were imposed pursuant to C.R.C.P. 41(a)(2), which provides in relevant part:

> [Subject to an exception not applicable here], an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. . . . Unless otherwise specified in the

> order, a dismissal under this subsection (2) is without prejudice.

Fed.R.Civ.P. 41(a)(2) is virtually identical, so federal precedent will be helpful in resolving this issue. *See United States v. Bell*, 724 P.2d 631, 645 n. 18 (Colo.1986); *Harding Glass Co., Inc. v. Jones*, 640 P.2d 1123, 1125 n. 3 (Colo.1982); *United Bank of Denver Nat'l Assoc. v. Shavlik*, 189 Colo. 280, 282, 541 P.2d 317, 318 (1975).

Generally, a plaintiff may not appeal from an order granting its request for voluntary dismissal. *Jensen v. Matthews-Price, M.D.*, 845 P.2d 542, 543 (Colo.App.1992); *accord Unioil, Inc. v. E.F. Hutton & Co., Inc.*, 809 F.2d 548, 555-56 (9th Cir.1986), *cert. denied*, 484 U.S. 822, 108 S.Ct. 83, 98 L.Ed.2d 45 (1987) & 484 U.S. 823, 108 S.Ct. 85, 98 L.Ed.2d 47 (1987); *LeCompte v. Mr. Chip, Inc.*, 528 F.2d 601, 603 (5th Cir.1976); *see also* 9 Wright & Miller § 2376. This rule is premised on the rationale that "such a dismissal cannot be characterized as an involuntary adverse judgment against the plaintiff." *Jensen*, 845 P.2d at 543; *see also* 5 James Wm. Moore et al., *Moore's Federal Practice* ¶ 41.05[3] (2d ed. 1993). As the United States Court of Appeals for the Fifth Circuit has noted, when such a dismissal is granted,

> the plaintiff has acquired that which he sought, the dismissal of his action and the right to bring a later suit on the same cause of action, without adjudication of the merits. The effect of this type of dismissal is to put the plaintiff in a legal position as if he had never brought the first suit.

LeCompte, 528 F.2d at 603.

In the present case, however, the dismissal was conditioned on terms imposed by the court under C.R.C.P. 41(a)(2) and to which AWDI never assented. The Colorado Court of Appeals has stated that rather than accept the terms and conditions of dismissal, "if a trial court places 'terms and conditions' upon a dismissal under C.R.C.P. 41(a)(2) which are unacceptable to plaintiff, plaintiff is entitled to elect to proceed with the litigation." *Powers v. Professional Rodeo Cowboys*, 832 P.2d 1099, 1104 (Colo.App.1992); *accord, e.g., Marlow v. Winston & Strawn*, 19 F.3d 300 (7th Cir.1994); *Unioil*, 809 F.2d at 554; *see also* 9 Wright & Miller § 2366. We have not previously been required to decide whether a plaintiff who disagrees with the legal or factual basis for terms or conditions imposed in an order dismissing a claim on the plaintiff's motion may choose not to proceed with litigation of the claim and yet preserve a right to challenge the terms and conditions on appeal.

The federal circuits have not adopted a single consistent analytic approach in deciding whether a plaintiff can appeal conditions imposed upon it under Fed.R.Civ.Proc. 41(a)(2) pursuant to a voluntary dismissal without prejudice. *Cauley v. Wilson*, 754 F.2d 769, 770 (7th Cir.1985); *see also* discussion in *Unioil*, 809 F.2d at 555-56. Some cases have held that conditions imposed in voluntary dismissal orders can be challenged on appeal only if they amount to legal prejudice. *Unioil*, 809 F.2d at 555-56; *LeCompte*, 528 F.2d at 603. The condition of payment of the opposing party's costs and expenses has been stated to constitute prejudice in a practical sense but not legal prejudice. *Unioil*, 809 F.2d at 555-56; *LeCompte*, 528 F.2d at 603. The

same court that decided *LeCompte*, however, has suggested that there will be cases

> in which the amount of money set as the price of a voluntary dismissal without prejudice is so clearly unreasonable as to amount to appealable 'legal prejudice'. . . . We will examine each case to ensure that the terms and conditions accompanying the grant of a plaintiff's Rule 41(a)(2) motion are not so outrageous as to demand a full appellate review.

Yoffe v. Keller Indus., Inc., 580 F.2d 126, 131 (5th Cir.1978), *cert. denied*, 440 U.S. 915, 99 S.Ct. 1231, 59 L.Ed.2d 464 (1979); *see also Mortgage Guaranty Ins. Corp. v. Richard Carylon Co.*, 904 F.2d 298, 300-01 (5th Cir. 1990); *Scholl v. Felmont Oil Corp.*, 327 F.2d 697, 700 (6th Cir.1964). This approach tends to intermingle the issue of entitlement to review and that of the reasonableness of the payment imposed. The Seventh Circuit Court of Appeals in *Cauley* adopted a more direct approach and permitted review of a condition to voluntary dismissal in order to assess abuse of discretion. The court explained:

> [A] plaintiff may understand that the dismissal without prejudice is conditioned on paying attorneys' fees yet disagree with the amount of fees awarded. Thus an order awarding attorneys' fees may qualify as an involuntary adverse judgment even though the plaintiff requested and received the Rule 41(a)(2) dismissal.

Cauley, 754 F.2d at 771; *see GAF Corp. v. Transamerica Ins. Co.*, 665 F.2d 364, 367-68 (D.C.Cir. 1981).

We adopt the approach in *Cauley* and also consider it appropriate to take cognizance of challenges to the legal propriety of imposing terms and conditions of dismissal, which we view as an assertion of "legal prejudice." *See Unioil*, 809 F.2d at 555-56; *LeCompte*, 528 F.2d at 603. Of course, it must also be shown in order to challenge a term or condition of dismissal on appeal that the party seeking dismissal did not actually acquiesce in imposition of the condition. *Mortgage Guaranty*, 904 F.2d at 300.

In the present case AWDI was aware that terms and conditions would be imposed incident to its voluntary dismissal. When the trial court orally granted AWDI's motion to dismiss on October 10, 1991, the court stated that the dismissal was subject to the condition that AWDI pay to the objectors "all attorney fees and expert witness fees and other fees and expenses incurred by the objectors that are otherwise appropriate during the pendency of this litigation which relate to the tributary claim." AWDI then proceeded to trial on October 15, 1991, on the nontributary claim alone.

Although aware of the terms and conditions imposed, AWDI never acquiesced to them. AWDI asserted in proceedings before the trial court that such terms and conditions were not legally permissible and has consistently maintained this position in the trial court and on appeal. The court in *LeCompte* determined that the plaintiff had not acquiesced to the conditions of dismissal where he not only objected to the inclusion of the defendant's proposed conditions in the dismissal order, but vigorously renewed his objections after the court issued its order, and – failing to obtain relief – then brought an appeal. The fact that the plaintiff never sought to have

the voluntary dismissal set aside was not considered dispositive. *LeCompte,* 528 F.2d at 604.

We hold that a party such as AWDI that obtains a voluntary dismissal of its claims subject to terms and conditions to which it consistently maintains its objections may challenge those terms and conditions as legally impermissible or as an abuse of discretion on appellate review. We consider it especially appropriate to address the challenge to the amount of the fees and expenses imposed here, because the amount had not been quantified at the time AWDI decided to go forward with the nontributary claim alone.

B. *Whether Section 13-17-102(5) or C.R.C.P. 11 Precludes an Award of Attorney Fees and Expenses incident to Dismissal of the Tributary Claim*

AWDI asserts that a requirement for payment of attorney fees and expenses as a term or condition of an order granting voluntary dismissal of a claim cannot be imposed in the absence of evidence and findings satisfying the requirements of section 13-17-102(5), 6A C.R.S. (1987), and C.R.C.P. 11 – provisions which have no analogs in the federal statutes or rules. We disagree.

As earlier noted, C.R.C.P. 41(a)(2) provides that, with exceptions not pertinent here, "an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper." Section 13-17-102(5) provides:

> No attorney fees shall be assessed if, after filing suit, a voluntary dismissal is filed as to any claim or action within a reasonable time after

> the attorney or party filing the dismissal knew, or reasonably should have known, that he would not prevail on said claim or action.

C.R.C.P. 11 provides, in pertinent part:

> Reasonable expenses, including a reasonable attorney's fee, shall not be assessed if, after filing, a voluntary dismissal or withdrawal is filed as to any claim, action or defense, within a reasonable time after the attorney or party filing the pleading knew, or reasonably should have known, that he would not prevail on said claim, action, or defense.

AWDI argues that the trial court could not impose attorney fees as a term or condition of dismissal under C.R.C.P. 41(a)(2) in the absence of a finding that AWDI did not move to dismiss within a reasonable time after it knew or reasonably should have known that it would not prevail on its tributary claim, as required by section 13-17-102(5) and C.R.C.P. 11. AWDI asserts that both those provisions are applicable whenever payment of attorney fees is imposed upon a party incident to dismissal of a claim, including dismissals under C.R.C.P. 41(a)(2).

Preliminarily, we note that AWDI offers no case support for its assertion that section 13-17-102(5) and Rule 11 apply to limit a trial court's discretion to impose terms and conditions on a grant of voluntary dismissal under Rule 41(a)(2). The limited number of Colorado cases that have interpreted the latter rule have never mentioned any limitation of that kind. *See Tillery v. District Ct.*, 692 P.2d 1079, 1084 (Colo.1984) (trial court may award costs and fees to defendant as a term and condition of voluntary

dismissal); *Powers v. Professional Rodeo Cowboys*, 832 P.2d 1099, 1102 (Colo.App.1992) (same).

More importantly, the purpose of Rule 41 is different than the objectives of section 13-17-102(5) and Rule 11. The language of both section 13-17-102 and Rule 11 expresses an intention to sanction a party who has continued to pursue a claim after the party or its attorney knew or should have known that the party would not prevail, i.e., that the claim is not meritorious.[40] No such language is present within Rule 41(a)(2).[41] Rule 41(a)(2) is intended to give the plaintiff the right to dismiss a claim that may later become viable or may be asserted later in a different forum, provided the court can ensure the defendant will not be unfairly prejudiced. *Tillery*, 692 P.2d at 1084; *accord McCall-Bey v. Franzen*, 777 F.2d 1178, 1184 (7th Cir.1985) (terms and conditions imposed pursuant to Rule 41(a)(2) are the "quid pro quo" of allowing plaintiff to dismiss a potentially meritorious claim without being prevented by the doctrine of res judicata from bringing the same suit

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[40] In fact, article 17, part 1, of the statute, in which § 13-17-102 appears, is captioned "Frivolous, Groundless, or Vexatious Actions," and is commonly known as the "frivolous and groundless litigation statute." 17 Colo.Law 465 (1988). *See also* § 13-17-101, 6A C.R.S. (1987) (legislative declaration that statute addresses claims that are "substantially frivolous, substantially groundless, or substantially vexatious"); *Shaw v. Baesemann*, 773 P.2d 609, 611 (Colo.App.1989) ("Both the title and purpose of the statute evince an intent to apply it only to frivolous, groundless, or vexatious actions.").

[41] In its reply brief in this court, AWDI acknowledges that "Rule 41(a)(2) is not intended to punish the party voluntarily dismissing a claim, nor to serve any purpose other than reimbursements."

again); *GAF Corp.*, 665 F.2d at 369 ("[n]o matter how conscientious and diligent [plaintiff] may have been, [defendant] suffered some costs by defending this action . . . and [defendant] is entitled to such reimbursement of those costs as the court may order"); *LeCompte*, 528 F.2d at 604 (Rule 41(a)(2) "allows the plaintiff to withdraw his action from the court without prejudice to future litigation"); 9 Wright & Miller § 2362. According to *Tillery*, a plaintiff's Rule 41(a)(2) motion to dismiss voluntarily without prejudice "generally should be granted," *Tillery*, 692 P.2d at 1085, but the court must first determine that any harm to the defendant may be avoided by imposing terms and conditions of dismissal.

Thus, a court's focus when determining appropriate terms and conditions under C.R.C.P. 41(a)(2) is necessarily on a remedy for the defendant, not punishment of the plaintiff. Rule 41(a)(2) provides a means for preserving a potentially meritorious claim for another day or another forum provided that conditions of dismissal can be devised to protect the defendants from prejudice. Section 13-17-102(5) and Rule 11, on the other hand, are intended to protect a plaintiff from imposition of attorney fees upon dismissal of an unmeritorious claim provided that the plaintiff seeks dismissal promptly after learning that the claim cannot prevail.

Although AWDI asserts that allegedly erroneous pretrial rulings by the trial court destroyed the prospects for success in establishing the tributary claim, AWDI has never conceded or suggested that such a claim was not meritorious or that it will not reassert such a claim in the future. We therefore reject AWDI's argument that imposition of a requirement of payment of attorney fees as a

condition of voluntary dismissal without prejudice of a claim under C.R.C.P. 41(a)(2) violates either section 13-17-102(5) or C.R.C.P. 11.

C. *Whether the Special Nature of Water Adjudication Proceedings Precludes the Award of Fees and Expenses Incident to Dismissal of the Tributary Claim*

AWDI also contends that the condition concerning payment of fees and expenses that was included in the court's C.R.C.P. 41(a)(2) order of dismissal of the tributary claim fails to take account of and is inconsistent with the unique nature of water right adjudication. We disagree.

AWDI notes that, unlike typical civil cases, once an application for determination of a water right or a right to nontributary ground water is filed, any person who wishes may file a statement of opposition, without complying with traditional standing requirements. *See* § 37-92-302(1)(b), 15 C.R.S. (1990); *Bunger v. Uncompahgre Valley Water Users Ass'n*, 192 Colo. 159, 165, 557 P.2d 389, 392 (1976). Thus, an applicant has no control over the number of objectors who participate in an action, or the fees and expenses they may generate. AWDI asserts that for this reason the imposition of fees and expenses in a water case can quickly become unfairly burdensome on the applicant. Every potential applicant, regardless of financial resources, would have to consider the possibility of future payment of objectors' fees and expenses in the event the applicant should later wish to dismiss its application. AWDI asserts that Colorado Uniform Water

Court Rule 5(b)[42] reflects this distinction between water court proceedings and other civil actions in its provision for voluntary dismissals. Rule 5(b) requires court approval for withdrawal of a water rights application if a statement of opposition has been filed, but makes no provision for the imposition of "terms and conditions."

A note at the beginning of the Uniform Local Rules For All State Water Court Divisions provides in relevant part, "[e]xcept as expressly provided in these rules, the Colorado Rules of Civil Procedure . . . shall apply to water court practice and procedure." Rule 5(b) contains no indication that C.R.C.P. 41 is not fully applicable to water cases. The fact that the number of objectors who need protection from prejudice by terms and conditions in an order of voluntary dismissal is large provides no persuasive reason to permit an applicant to obtain dismissal of a claim without providing such protection. We reject the contention that C.R.C.P. 41(a)(2) does not apply to water right adjudications.

D. *Whether the Trial Court Employed an Incorrect Standard or Relied on Insufficient Evidence in Assessing Fees and Expenses incident to Dismissal of the Tributary Claim*

AWDI asserts that even if the trial court could award fees and expenses as a condition of voluntary dismissal of

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[42] Rule 5(b) provides:

An application against which a statement of opposition has been filed shall not be withdrawn or dismissed except by order of the court.

Rule 5(b), Uniform Local Rules For All State Water Court Divisions, 7B C.R.S. (1993 Supp.).

a claim, the court erred by employing an incorrect standard in determining the extent to which the fees and expenses are allowable. Furthermore, AWDI contends, evidence adduced in support of the amounts assessed was legally insufficient.

1. *Correctness of Standard*

We first address whether the court used the correct standard in determining attorney fees and expenses. AWDI argues that the trial court did not properly limit the award to those fees and expenses for activities that were rendered useless by the dismissal. Such a criterion, it contends, is the correct standard for assessing the limits of a permissible award of fees and expenses incident to a voluntary dismissal under C.R.C.P. 41(a)(2).

Tillery contains some guidance concerning the proper standard:

> The district court could require the costs and fees to be reimbursed as a condition of granting the motion to dismiss, although consideration should be given to the fact that the defendants may recoup some of the fees if they prepare an answer to the petitioner's complaint in federal court.

Tillery, 692 P.2d at 1085. Because C.R.C.P. 41(a)(2) is "identical to the corresponding federal rule and the rules adopted by several other states," *Tillery*, 692 P.2d at 1084, it will also be helpful to look to the standards applied in cases outside this jurisdiction for guidance. Federal courts have consistently limited reimbursement under Fed.R.Civ.P. 41(a)(2) to expenses for work that will not be

useful in future litigation of the same claim. *Lau v. Glendora Unified School District*, 792 F.2d 929, 932 (9th Cir.1986) (Reinhardt, J., concurring) (defendant "not entitled to reimbursement of costs and legal fees incurred in preparing work product that may be useful in continuing litigation"); *McCants v. Ford Motor Co., Inc.*, 781 F.2d 855, 860 (11th Cir.1986) (where a subsequent similar suit between the parties is contemplated, expenses awarded might be limited to those incurred in discovering information that will not be useful in the later suit); *Cauley*, 754 F.2d at 772 (trial court found to have abused its discretion in awarding fees for work product which could be useful in defending same claim in state court where claim was being pursued); *McLaughlin v. Cheshire*, 676 F.2d 855, 856-57 (D.C.Cir.1982) (no entitlement to reimbursement for expenses in preparing work product that will be useful in continuing litigation in another forum); *GAF Corp.* 665 F.2d at 369 (same); *Brown v. Zackert*, 10 Kan.App.2d 466, 701 P.2d 711, 714 (1985) ("while the conditions of dismissal are within the discretion of the court, the range of that discretion is confined to terms which relieve the defendant from the potential waste occasioned by the dismissal"). These cases are consistent with *Tillery* and provide helpful elaboration of the standard that we suggested in that case.

AWDI asserts that the trial court failed to apply this standard in the present case. In issuing the payment order, the trial court noted that dismissal of the tributary claim had previously been conditioned on the applicant's payment to the objectors of "all of their attorney fees, expert witness fees, costs, fees, and other expenses related to the tributary claim." AWDI contends that the

words "related to" sweep too broadly and asserts that this language is evidence that the trial court improperly ordered the payment to the objectors of all expenses having anything to do with the tributary claim, including those incident to gathering information also useful in litigating the nontributary claim or that could be used against AWDI in future litigation of the tributary claim.

The remainder of the trial court's order, however, indicates that the court properly considered the danger of overlap with the nontributary claim and the possibility that work expended on the tributary claim would be useful in future litigation of the latter claim. The court rejected the possibility that work devoted to the tributary claim would be useful in future litigation of that claim, stating:

> Depending on when a new tributary claim may be filed, much of the material discovered by Objectors prior to September 1991 will be outdated, if not useless, in any hearing concerning a "new" tributary claim. Any benefit from this earlier discovery is speculative at best.

In addition, the trial court expressly recognized the necessity of avoiding reimbursement of expenses incurred in gathering information useful in litigation of the nontributary claim. Out of concern about the possibility of "overlap," among other things, the court discounted the award of attorney fees and expense claims by ten percent.

Other than the court's use of the phrase "related to the tributary claim," AWDI offers no support for its contention that the trial court failed to apply the proper standard limiting its award of attorney fees and costs

under Rule 41(a)(2) to expenses for work that it determined was not useful in defending against the nontributary claim or would not be of use in future litigation of a renewed tributary claim. We reject the contention that the trial court used the wrong standard in awarding fees and expenses.

2. *Sufficiency of Evidence*

AWDI asserts that even if the court used the proper standard, the evidence was insufficient to identify the fees and expenses incurred for work useful only on the tributary claim, failed to establish that the scope of the work on that claim was reasonable, and failed to show the reasonableness of the amounts charged for such work. We disagree with each of these assertions.

a. *Identification of Fees and Expenses Attributable to Tributary Claim*

AWDI as well as the objectors understood that determining an appropriate award might be difficult due to the possibility of overlap between the work performed and information gathered by the objectors to defend against the nontributary claim which went to trial and the efforts directed to defend against the tributary claim which was dismissed. This difficulty occurred in part because until AWDI unexpectedly moved to dismiss the tributary claim, the objectors had no reason to distinguish carefully between the two claims in maintaining their records of work performed and expenses incurred.

The party requesting an award of attorney fees bears the burden of proving by a preponderance of the evidence its entitlement to such an award. *Kinsey v. Preeson*, 746 P.2d 542, 551-52 (Colo.1987) (citing *Board of County Comm'rs v. Auslaender*, 745 P.2d 999, 1001-02 (Colo.1987)); *see* § 13-25-127, 6A C.R.S. (1987) (burden of proof in any civil action, except claim for exemplary damages or body execution, "shall be by a preponderance of the evidence"); *Spensieri v. Farmers Alliance Mutual Ins. Co.*, 804 P.2d 268, 271 (Colo.App.1990) ("If the attorney provides a reason and rational basis for the work done, he or she should be compensated accordingly. . . . "); *see also Blum v. Stenson*, 465 U.S. 886, 897, 104 S.Ct. 1541, 1548, 79 L.Ed.2d 891 (1984) (when the fee claimant has carried his burden of showing that the claim rate and number of hours are reasonable, the product is presumed to be the reasonable fee contemplated by 42 U.S.C. § 1988). Counsel is not required "to record in great detail how each minute of his time was expended. But at least counsel should identify the general subject matter of his time expenditures." *Hensley v. Eckerhart*, 461 U.S. 424, 437 n. 12, 103 S.Ct. 1933, 1941 n. 12, 76 L.Ed.2d 40 (1983). This was done.

In this case the objectors' attorneys introduced time records kept contemporaneously with work done. The extent of the information varied, and the records kept by the private attorneys were generally more detailed than those of the government attorneys, but all included the

date, the attorney, the time expended, and a general statement of work done.[43]

In addition, attorneys for the objectors testified as to the manner in which they allocated fees and expenses between the tributary and nontributary issues for the purpose of their claims under C.R.C.P. 41(a)(2). For instance, the lead attorney for the United States testified that virtually all of his time was devoted to the tributary claim, "but we decided to make the figure 85 percent, which is, I think, a very conservative estimate." The attorney for Oliver Powell Roemer III and Howard Platz testified that the concerns of both of those clients were limited to the tributary claim. He averred, "By definition, if the water was nontributary, it could not affect their water rights. Only tributary claims could affect their water rights." Accordingly, the fees and expenses incurred on behalf of those clients were limited to the tributary claim.

In response to AWDI's assertion that the objectors' work defending against the tributary claim must have been used in litigating the nontributary claim, an attorney for Rio Grande Water Users Association and San Luis Valley Water Conservancy District stated:

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[43] The attorneys' time records introduced into evidence contained excisions for time spent on portions of the case other than the tributary claim. Although AWDI objected to such excisions, we fail to see how they inhibited the trial court's ability to evaluate the unexcised portions and determine whether they applied to the tributary claim.

> There's a big difference between trying a tributary claim and a nontributary claim. In a nontributary claim, all you've got to show is impact on any stream of one-tenth of 1 percent. In a tributary claim, you've got to know which stream systems are impacted and what amounts with a good deal of greater precision. . . .

This attorney also testified, "[Y]ou spend a lot of time on a whole broad range of issues related to – on a tributary case that would never come up in a nontributary setting." In order to allocate accurately the time spent on each claim, this counsel reviewed all of his firm's billing statements, covering attorney fees and expenses, and

> went through line by line, item by item, for every month and every year since the inception of this litigation and made a determination of what time I felt was fairly attributable to our work on the tributary claim and excluded all remaining time and used that to come up with a total number of hours and a total amount of expenses.

As a result of this review, he determined that fifty-eight percent of the attorney fees was attributable to the tributary claim. The attorney for Rio Grande Water Conservation District testified that he too went through the bills submitted by his firm to the District from 1987 through 1991 in order to identify those attorney fees and expenses related to the tributary claim.

Expert witness fees and expenses were allocated in a similar fashion. The objectors' attorneys testified that those experts involved in aspects of both the tributary and the nontributary claims were asked to itemize their monthly bills and provide a breakdown of costs they

considered attributable to the tributary and nontributary claims, and that they did so. In most instances, documents in the form of letters, bills, and/or affidavits from expert witnesses were admitted to support the attorney testimony.

Although all these allocations were made after the fact, they nonetheless provide support for the court's award determinations. The trial court was provided with an adequate evidentiary basis to find as it did that the objectors' allocations were adequate. The Tenth Circuit Court of Appeals, in a case involving an application for attorney fees and costs under the Civil Rights Attorney's Fees Award Act, recognized:

> [S]ome lawyers will not have kept contemporaneous time records. We do not forbid, retrospectively, the use of reconstructed time records and do not demand that the reconstructed hours be arbitrarily reduced.

Ramos v. Lamm, 713 F.2d 546, 553 n. 2 (10th Cir.1983). In a number of other cases as well, reconstructed time records have been held adequate to establish time expended. *See Pawlak v. Greenawalt*, 713 F.2d 972, 978 (3d Cir.), *cert. denied*, 464 U.S. 1042, 104 S.Ct. 707, 79 L.Ed.2d 172 (1984); *Bonnette v. California Health & Welfare Agency*, 704 F.2d 1465, 1473 (9th Cir.1983); *Johnson v. University College*, 706 F.2d 1205, 1207 (11th Cir.1983), *cert. denied*, 464 U.S. 994, 104 S.Ct. 489, 78 L.Ed.2d 684 (1983); *Weber v. Weinberger*, 651 F.Supp. 1379, 1393 (W.D.Mich.1987). Here, the contemporaneous time records existed and were presented to the court; only the relevant allocations had to be supplied in part by estimates. None of the objectors realized at the time the records were kept that AWDI would later be

required to pay the attorney fees and expenses and that division by issue would be necessary, and AWDI claims no bad faith on the part of the objectors in this case.

"It is elementary that the trier of fact can look to either testimony or exhibits which have been admitted into evidence for the facts upon which to base his decision." *Hartman v. Freedman*, 197 Colo. 275, 280, 591 P.2d 1318, 1321 (Colo.1979). Based on our own review of the record, we conclude that the evidence, including billing records and testimony concerning allocation of time and expenses, was sufficient to permit the trial court, applying the proper standard, to allocate fees and expenses between those that were allowable and those that were not. We therefore sustain the trial court's allocation.

b. *Scope of Work Performed in Defense of Tributary Claim*

AWDI contends that some of the attorney fees and expenses incurred by the objectors and attributable to the defense of the tributary claim were unnecessary or excessive. As principal support for that contention, it presented the testimony of two experienced natural resource attorneys at the fees hearing. The first expressed the opinion that some of the matters the objectors investigated, in particular the issue of potential injury to vested water rights, should have been deferred until after the court determined whether the water was tributary. Furthermore, in that expert's opinion, the objectors are not entitled to recover any costs of initiated discovery. He asserted that because the burden of proving absence of injury and sufficiency of water supply is on the applicant,

the objectors' role is simply to stand back and take issue with what an applicant has presented, or request more information. Accordingly, any investigation beyond this would be inappropriate or a luxury and should not be the subject of compensation.

The trial court, however, did not accept this view of the scope of activity reasonably to be conducted by objectors to an application for determination of water rights. The trial court properly rejected this passive model of an objector's role, pointing out the need for evidence from both sides in order to arrive at a correct resolution and the practical need or advantage for an objector to resist an adjudication of a water right in the first instance by demonstrating that an applicant cannot satisfy the criteria for establishment of such a right.

AWDI's second expert witness on the excessive scope issue asserted that the amount of fees and expenses to be reimbursed should be reduced because the objectors failed to mitigate those fees and expenses. He contended that the objectors realized early in the litigation that no water contracts had been entered into between AWDI and any prospective beneficial users of the water. According to that expert, because such a defect is fatal to the application for determination of a tributary water right in this case,[44] the objectors should have moved for summary

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[44] In order to obtain a decree for a conditional water right, an applicant must demonstrate an intent to appropriate. Where the applicant is seeking to appropriate for the future needs and uses of others, it must present sufficient evidence to demonstrate their commitment to actual beneficial use of the water. "[M]ere negotiations with other municipalities clearly do not

judgment on the tributary claim, and they should not now be compensated for the "unnecessary" fees and expenses incurred subsequent to the date at which this motion should have been made. The water contracts issue, however, was not relevant to some of the beneficial uses claimed by AWDI.[45] The trial court considered the expert's opinion and in its written order for attorney fees and expenses specifically found that "there would have been genuine material fact [sic] at issue that would have required the Court to deny a motion for partial summary judgment on the tributary claim."[46] On this record, we cannot say that the objectors incurred unnecessary expenses because they did not seek partial summary judgment on the tributary claim.

Lastly, AWDI contends that the number of experts hired by the objectors to analyze and review the State's ground water computer modeling was excessive and therefore wasteful. Based upon our review of the record of the fees hearing, we are satisfied that the trial judge

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rise to the level of definite commitment for use required to prove the intent here required." *Colo. River Water Cons. Dist. v. Vidler Tunnel Water Co.*, 197 Colo. 413, 417, 594 P.2d 566, 568 (1979).

[45] The expert's testimony does not take account of the fact that AWDI proposed to use some of the water to be produced for irrigation of its own lands in the Valley, a use not subject to the *Vidler* requirements.

[46] Moreover, the witness himself testified that the date on which it should have been clear to the objectors that no contracts existed was no sooner than November of 1990, four years after the start of litigation and well after most of the attorney fees and expenses at issue had been incurred.

adequately considered the reasonableness and the necessity of the services provided by those experts.

For the foregoing reasons, and because our own review of the record discloses no suggestion that the objectors sought recovery for work not necessary to their defenses, we affirm the trial court's rejection of AWDI's arguments that the objectors incurred unnecessary fees and expenses by reason of the scope of their efforts in defending against the tributary claim.

c. *Reasonableness of Amounts Charged for Fees and Expenses*

The United States Supreme Court has stated that while " 'there is no precise rule or formula' for determining attorney's fees," *Evans v. Jeff D.*, 475 U.S. 717, 735-36, 106 S.Ct. 1531, 1542, 89 L.Ed.2d 747 (1986) (quoting *Hensley*, 461 U.S. at 436, 103 S.Ct. at 1941), the proper starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. *Hensley*, 461 U.S. at 433, 103 S.Ct. at 1939 (considering fee to be awarded under 42 U.S.C. § 1988); *accord Ramos*, 713 P.2d at 552 (same); *Spensieri*, 804 P.2d at 270 (estimate of a reasonable attorney fee involves a calculation of the "lodestar" amount, which represents the number of hours reasonably expended multiplied by a reasonable hourly rate); *see Mau v. E.P.H. Corp.*, 638 P.2d 777 (Colo.1981).

AWDI has not challenged the amount of time spent by attorneys for the objectors on particular tasks as excessive. Instead, it has contended that the usefulness of the tasks themselves was not limited to the tributary claim

and that the scope of the work performed was not reasonable. These objections were rejected earlier in the immediately preceding sections of this opinion.

AWDI also has not objected to the reasonableness of the hourly rate charged by attorneys from private law firms. It has stipulated that $100 per hour, the rate charged, was a reasonable rate for those attorneys. Nor has AWDI objected to the rates charged by lawyers for the United States, who were on the staff of the United States attorney. AWDI does object to the rates at which the State's attorneys, who were on the staff of the State attorney general, billed their time. The State claimed, and the court awarded, $100 per hour for attorney time and $50 per hour for the time of legal assistants. AWDI objects to this award because the interdepartmental billings for services of attorneys and legal assistants on the staff of the State attorney general at the relevant time were based on hourly rates of $40.75 and $27.44 respectively. AWDI argues that the state employees cannot be awarded more than these hourly rates. We disagree.

Rule 41(a)(2) expressly gives the court power to grant a motion for dismissal under the rule upon such terms and conditions as the court deems proper. Thus, determination of the terms and conditions of dismissal under 41(a)(2) is discretionary with the trial court and will not be disturbed on review absent an abuse of that discretion. *Stevedoring Servs. of America v. Armilla Int'l*, 889 F.2d 919, 921 (9th Cir.1989); *Moore v. C.R. Anthony Co.*, 198 F.2d 607, 608 (10th Cir. 1952); *Bishop v. W. American Ins. Co.*, 95 F.R.D. 494, 495 (N.D.Ga.1982); *see American Cyanamid Co. v. McGhee*, 317 F.2d 295, 298 (5th Cir.1963) (trial court has discretion to impose terms and conditions); *see also*

Powers, 832 P.2d at 1102. Typically, courts impose as a term and condition of dismissal a requirement that the plaintiff pay the defendant the expenses incurred in defending the suit, which usually include reasonable attorney fees. *Marlow v. Winston & Strawn*, 19 F.3d 300 (7th Cir.1994); *Mortgage Guaranty*, 904 F.2d at 300; *LeCompte*, 528 F.2d at 603; *Bath Iron Works Corp. v. Parmatic Filter Corp.*, 736 F.Supp. 1175, 1178 (D.Me.1990). The award of attorney fees must be reasonable, and "[t]he determination of reasonableness is a question of fact for the trial court and will not be disturbed on review unless it is patently erroneous and unsupported by the evidence." *Harman v. Freedman*, 197 Colo. 275, 281, 591 P.2d 1318, 1322 (1979) (fees awarded pursuant to § 8-4-114, C.R.S. (1973)); *accord Rifkin v. Steele Platt*, 824 P.2d 32, 35 (Colo.App.1991); *Spensieri*, 804 P.2d at 270; *Greeley Nat'l Bank v. Sloan*, 677 P.2d 409, 412 (Colo.App.1983). The trial judge considered the reasonableness of fees issue and expressly determined that "[one] hundred dollars an hour by water lawyers . . . is an extremely minimum rate and eminently reasonable, whether it be in the public or the private sector."

We have previously held that attorneys are entitled to an award of reasonable attorney fees at market rates for attorneys of comparable skill, experience and reputation:[47]

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[47] As for legal assistants, *see Missouri v. Jenkins*, 491 U.S. 274, 287-88, 109 S.Ct. 2463, 2471-72, 105 L.Ed.2d 229 (1989), in which the Supreme Court concluded that the district court properly compensated the work of paralegals at market rates rather than at their cost to attorneys.

> If the fee requested is reasonable in light of community standards and the other criteria to be considered by the court, it is not appropriate for a court to take into consideration what a major client may pay the attorney on an hourly basis or the possible absence of overhead expenses comparable to those borne by lawyers in private practice.

Mau, 638 P.2d at 780 (attorney fees awarded to tenant's attorney pursuant to section 38-12-103(3)(a), 16A C.R.S. (1973) (citation omitted)); *see also Spensieri*, 804 P.2d at 271 ("The criterion for the court is not what the parties agreed, but what reflects reasonable value for services rendered."). Numerous other courts have held that fees awarded are to be "based on reasonable billing rates in the relevant community, not net hourly earnings." *Hamilton v. Daley*, 777 F.2d 1207 (7th Cir.1985) (fees awarded to government attorneys defending against frivolous civil rights suit; fact that attorneys are public servants who will not personally receive any fees awarded makes no difference).[48] Therefore, we find that the hourly rate awarded to the State of Colorado for attorney fees and paralegal services was not an abuse of discretion.

AWDI also contends that the amounts allowed for expert witnesses and consultants were unreasonable or

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[48] *See* cases involving the federal civil rights statute, 42 U.S.C. § 1988 (1982). The federal courts have consistently held that public interest attorneys are entitled to an award of reasonable attorney fees based upon the market rate within the community. *See Blum v. Stenson*, 465 U.S 886, 892-96, 104 S.Ct. 1541, 1545-48, 79 L.Ed.2d 891 (1984); *Ramos v. Lamm*, 713 F.2d 546 (10th Cir.1983); *see also Oten v. Colorado Bd. of Social Services*, 738 P.2d 37, 42 (Colo.App. 1987).

unsubstantiated. AWDI points to no particular bills as unreasonable in amount. The objectors documented these fees with billing records, expert testimony summaries, and testimony by attorneys and state personnel as to the nature of the work performed, the method of allocation of expenses between the tributary and nontributary claims and the reasonableness of the fees charged. There was evidence, although general in nature, that the fees were reasonable for the services performed.

The trial court did not simply award to the objectors all attorney fees and expenses requested. Instead, it examined the claims made and assessed the reasonableness and substantiation given for the claims. The trial judge disallowed: (1) the state's claim for reimbursement of $9,000 for court reporter fees; its claim of $173,818 for compensation for nonlegal employees of the Division of Wildlife and the State and Division Engineers' Offices; and its claim of $1300 for a bat detector; (2) the "unsubstantiated or unverified claims of Cotton Creek Ranch, Dennis Felmlee and Timothy Lovato; (3) compensation for time and attorney fees spent post-trial in preparing the fee application; and (4) certain room and board expenses. In addition, the trial court, "out of an abundance of caution and so as to preclude any concerns about vagueness, overlap, possible redundancy or questionable expense," discounted the attorney fee and expense claims under Rule 41(a)(2) by ten percent.

> In similar cases with voluminous fee applications, courts have recognized that it is unrealistic to expect a trial judge to evaluate and rule on every entry in an application. *See Copeland v. Marshall,* 641 F.2d 880, 903 (D.C.Cir.1980) (en

> banc) (22% cut); *Ross v. Saltmarsh*, 521 F.Supp. 753, 761-62 (S.D.N.Y.1981) (5% and 10% cuts), *aff'd mem.*, 688 F.2d 816 (2d Cir.1982); *Kane v. Martin Paint Stores, Inc.*, 439 F.Supp. 1054, 1056 (S.D.N.Y.1977) (10% cut), *aff'd mem.*, 578 F.2d 1368 (2d Cir. 1978). These courts have endorsed percentage cuts as a practical means of trimming fat from a fee application.

New York Ass'n for Retarded Children v. Carey, 711 F.2d 1136 (2d Cir.1983). We sustain the trial court's determination of the amounts to be awarded for attorney fees and expenses attributable to defenses of the tributary claim.

3. *Summary*

The trial judge concluded that most of the attorney fees and expenses incurred by the objectors in defending the tributary claim "were both necessary and reasonable." Having participated in each stage of the proceeding, the trial judge was capable of understanding what was reasonably expended in attorney fees. *San Juan Products, Inc. v. San Juan Pools of Kansas, Inc.*, 849 F.2d 468, 476 (10th Cir.1988); *see also Mares v. Credit Bureau of Raton*, 801 F.2d 1197, 1201 (10th Cir.1986) (since the trial court saw attorney's work first hand, it has far better means of knowing what is just and reasonable than does the appellate court). It also heard the testimony of expert witnesses, and was familiar with much of their work product in the form of exhibits.

> A determination of reasonableness is a question of fact for the trial court and 'will not be disturbed on review unless it is patently erroneous and unsupported by the evidence.' If . . . the

> statute pursuant to which an award of attorney fees is made, does not provide a specific definition of 'reasonable,' then such compensation should be determined in light of all circumstances for the time and effort reasonably expended by the prevailing party's attorney.

Spensieri, 804 P.2d at 270 (citations omitted).

The trial judge made findings and conclusions to support his determinations. The attorneys for the objectors testified that they coordinated efforts among themselves so as to minimize duplication of effort and expenses. The trial judge found that they "were very careful to minimize expenses and eliminate duplication of effort." The trial court also found that many of the early expenses incurred by the objectors were the result of AWDI's failure of timely and complete compliance with discovery requests. All these findings, though general, are sufficient and supported by the record.

We conclude that AWDI's challenge to the amount of attorney fees, expenses, and costs awarded as a condition to voluntary dismissal of the tributary claim under C.R.C.P. 41(a)(2) must fail.

E. *Whether Excessive Costs were Awarded Incident to Dismissal of the Nontributary Claim*

AWDI also challenges the amount of costs awarded to the objectors under C.R.C.P. 54(d), taking issue with the sufficiency of the evidence and the judge's findings, and asserting abuse of discretion in setting the amount of the award.

C.R.C.P. 54(d) provides, "costs shall be allowed as of course to the prevailing party unless the court otherwise directs. . . . " Section 13-16-122 lists those items includable as costs.[49] The objectors submitted bills of costs under C.R.C.P. 54(d) of $473,091.31 for costs related to the nontributary claim, and the trial court awarded that entire amount.

The principal costs claimed under Rule 54(d) were for expert witness fees. "[C]harges for expert witnesses approved pursuant to section 13-33-102(4)" are expressly allowed as costs under section 13-16-122(1)(e). Section 13-33-102(4), 6A C.R.S. (1987), provides:

> Witnesses in courts of record called to testify only to an opinion founded on special study or experience in any branch of science or to make scientific or professional examinations and state

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[49] Section 13-16-122, 6A C.R.S. (1987), provides:

Items includable as costs. (1) Whenever any court of this state assesses costs pursuant to any provision of this article, such as costs may include:

(a) Any docket fee required by article 32 of this title or any other fee or tax required by statute to be paid to the clerk of the court;

* * *

(e) The witness fees, including subsistence payments, mileage at the rate authorized by section 13-33-103, and charges for expert witnesses approved pursuant to section 13-33-102(4);

(f) Any fees for exemplification and copies of papers necessarily obtained for use in the case;

* * *

(j) Any item specifically authorized by statute to be included as part of the costs.

> the result thereof shall receive additional compensation, to be fixed by the court, with reference to the value of the time employed and the degree of learning or skill required.

Rio Grande Water Conservation District claimed $257,227.00 in expert witness fees, the United States claimed $126,640.13, and the State claimed $65,810.94. AWDI contends that the award of these fees was improper because "there was no evidence of the reasonableness or necessity of the work or the expert testimony." This is not so.

AWDI presented a set of expert witnesses who offered opinions, supplemented by numerous exhibits, concerning the complex geologic and hydrologic features of the San Luis Valley, including the movement of underground water, and the effect of pumping underground water on surface streams and waters tributary thereto. This testimony was complemented by a computer model, and expert testimony was offered concerning the design, operation, and results achieved by use of the model. All of this evidence was offered in support of AWDI's claim that the withdrawal of underground water in the quantities sought in its amended application would not produce effects inconsistent with the classification of the water as nontributary under the statutory definition in section 37-90-103(10.5) 15 C.R.S. (1990). In response to this evidence, the objectors introduced experts and a computer model developed by the State in an effort to discredit the picture of the geologic and hydrologic characteristics of the Valley drawn by AWDI's experts and the validity of AWDI's computer analysis, all directed to showing that the statutory test for nontributariness was

not satisfied. The evidence was highly technical and in many instances sharply conflicting. Ultimately, the trial judge concluded that AWDI had not successfully established that the test for nontributariness had been met.

The judge was present at the trial and therefore could evaluate first hand the necessity of each witness's testimony. *See Leadville Water Co. v. Parkville Water Dist.*, 164 Colo. 362, 367, 436 P.2d 659, 661 (1967). Furthermore, during the three day evidentiary hearing, billing statements and testimony were offered to demonstrate that the witness fees requested were both necessary and reasonable. Because of the existence of all the above support, the *Fenton* case, relied upon by applicants for their contention that a claim for "lump sum witness fees" is improper, is inapposite. *See Fenton v. Fibreboard Corp.*, 827 P.2d 564, 569 (Colo.App.1991) *aff'd in part and rev'd in part on other grounds* by *Fibreboard Corp. v. Fenton*, 845 P.2d 1168 (Colo.1993). The party requesting fees in *Fenton* provided no documentation indicating a reasonable basis upon which the sums requested were calculated, nor were the actual sums expended for the witnesses' services shown. *Fenton*, 827 P.2d at 569.

Pursuant to section 13-33-102(4), 6A C.R.S. (1986), courts may grant witness fees to experts, testifying as such, in such amounts as they deem proper. *Denver Joint Stock Land Bank v. Board of County Comm'rs*, 105 Colo. 366, 372, 98 P.2d 283, 287 (1940); *accord Lamont v. Riverside Irr. Dist.*, 179 Colo. 134, 142, 498 P.2d 1150, 1154 (1972) (assessment of expert witness fees is addressed to the sound discretion of the trial court) (1972); *Leadville Water Co.*, 164 Colo. at 367, 436 P.2d at 661 (1967) (same). The court is authorized, in fixing an expert's fee, to consider

not only the time spent in court but also the time spent by the expert in preparation for trial, *Yeager Garden Acres, Inc. v. Summit Constr. Co.*, 32 Colo.App. 242, 245-46, 513 P.2d 458, 460 (1973). In addition, allowances awarded any include travel, ordinary witness fees, food, and lodging expenses. *Leadville Water Co.*, 164 Colo. at 366, 436 P.2d at 661. The trial judge here determined that the entire amount requested by the objectors under Rule 54(d) should be awarded. This was not an abuse of discretion. The award was amply supported by billing statements and expert testimony summaries, as well as testimony concerning the nature and purpose of the services upon which the witness fees were based and the manner by which they were determined. "When we have before us the finding of a trial judge who had the opportunity to evaluate the services of the experts based upon all the evidence before him and arrive at a fair conclusion of their reasonable worth, we do not interfere with his finding." *Leadville Water Co.*, 164 Colo. at 367, 436 P.2d at 661.

Some of the miscellaneous expenses that the court awarded as costs are not listed in section 13-16-122. AWDI asserts that any items not included within the definition of costs under that section or otherwise allowed by statute or rule may not be awarded, and insists that the trial court's award to the United States of $16,873.52 for setting up an office in Alamosa, including leasing office furniture and equipment, was therefore unauthorized. It also asserts that the court's award to the Rio Grande Water Users of $5,000 for photocopying expenses and $1,500 "for postage, for messengers, for mileage, and telephone," was improper for the same reason. As to "miscellaneous" expenses, we have held that:

> The list of expenses that may be awarded as costs under section 13-16-122 . . . is illustrative and not exclusive. *Church v. American Standard Ins. Co. of Wisconsin*, 764 P.2d 405, 406 (Colo.App.1988). In general, absent a specific prohibition, the trial court has discretion over the awarding of costs. *Id.; see Rossmiller v. Romero*, 625 P.2d 1029, 1030 (Colo. 19981).

Cherry Creek School District #5 v. Voelker, 859 P.2d 805, 813 (Colo.1993) (quoting *Ferrell v. Glenwood Brokers, Ltd.*, 848 P.2d 936, 940 (Colo.1993)). *See also* 6 James Wm. Moore et al., *Moore's Federal Practice* ¶ 54.70[5] (2d ed. 1993):

> In an action tried to the court, the court has a large discretion in admitting in evidence all pertinent matters which in the court's view would expedite the trial and which would give the court and the parties a clear conception of the points in issue; and may allow as costs the actual and reasonable expenses attendant thereto, although no express statutory enactment so provides.

Given logistical difficulties presented by the location and duration of the trial and the extensiveness of the exhibits, we conclude the trial court was within its discretion in allowing costs to the United States for establishing a temporary office in Alamosa. We also affirm the award to Rio Grande Water Users for photocopying and other miscellaneous expenses.[50]

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[50] AWDI cites a decision of the Colorado Court of Appeals, *Shultz v. Linden-Alimak, Inc.*, 734 P.2d 146 (Colo.App.1986), in which the court disallowed the award of expenses incurred for photocopies, blueprints, long distance phone calls, and postage as costs because "[t]here is no statutory authorization for

In summary, we reject AWDI's challenges to the award of costs under C.R.C.P. 54(d).

VII. *Conclusion*

For the foregoing reasons the judgments of the District Court for Water Division 3 are affirmed.

SCOTT, J., does not participate.

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including these items as part of the costs." *Id.* at 150. That case has since been criticized in *Perkins v. Flatiron Structures, Co.*, 849 P.2d 832, 836 (Colo.App.1992). In that later case, the court of appeals pointed out that § 13-16-122(1)(f) expressly authorizes an award for copies of papers necessarily obtained for use in the case. AWDI does not contend that the photocopies were not necessarily obtained for use in this case. It was therefore within the discretion of the trial court to award photocopying expenses. *See id.* at 836.

DISTRICT COURT, WATER DIVISION 3, COLORADO

CASE NO. 86-CW-46

MEMORANDUM AND ORDER OF PARTIAL SUMMARY JUDGMENT DISMISSING THE APPLICANTS' SPANISH OR MEXICAN AND FEDERAL LAND GRANT CLAIMS

CONCERNING THE APPLICATION FOR WATER RIGHTS OF:
AMERICAN WATER DEVELOPMENT, INC., THE BACA RANCH COMPANY, AND THE BACA CORPORATION, IN SAGUACHE COUNTY.

This matter came on before the Court on the Motion for Partial Summary Judgment Dismissing the Applicants' Spanish or Mexican and Federal Land Grant Claims filed by the Objectors Rio Grande Water Conservation District, for itself and on behalf of the Joint Objectors[1], the Rio Grande Water Users Association, and the United States of America (collectively "Objectors"). The State Objectors, constituting the State Engineer and Division Engineer for Water Division 3, the Colorado Division of Wildlife, and the Colorado Water Conservation Board, joined in the Objectors' motion. Having reviewed the

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[1] The "Joint Objectors", who are appearing jointly with the Rio Grande Water Conservation District for purposes of this case, include the Conejos Water Conservancy District, San Luis Valley Water Conservancy District, San Luis Valley Irrigation Well Owners, Inc., the City of Alamosa, the City of Monte Vista, the Town of La Jara, the Town of Crestone, Saguache County, and Rio Grande County.

briefs, heard the arguments of counsel and being fully informed in the premises the Court rules as follows:

On December 31, 1986, American Water Development, Inc., the Baca Ranch Company, and the Baca Corporation ("Applicants") jointly filed an application for the determination of their right to withdraw 200,000 acre-feet of groundwater annually from the aquifers underlying land known as the Luis Maria Cabeza de Baca Grant No. 4 and certain other lands near the towns of Moffat and Villa Grove (hereinafter referred to as the "Application").

The Applicants assert four alternate claims for relief. Claim Nos. 2 and 3 of the Application, which Objectors' motion and this Memorandum and Order address, assert an absolute right of ownership to groundwater underlying the Baca Grant No. 4 arising from an alleged grant under Spanish or Mexican law, or alternatively, from an absolute grant made by the United States.[2] These land grant claims are asserted by the Applicants to exist entirely independent of Colorado's constitutional and statutory system for allocating its water resources. The Objectors submitted by their motion that the land grant claims should be summarily dismissed as being without basis.

The genesis of the Applicants' land grant claims can be summarized as follows. On February 2, 1848, the United States and the Republic of Mexico entered into the

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[2] For purposes of their motion only, the Objectors assume arguendo that the Applicants own those portions of the Baca Grant No. 4 subject to the Application.

Treaty of Peace, Friendship, Limits, and Settlement, February 2, 1848, United States-Mexico, 9 Stat. 922, T.S.No. 207 ("Treaty of Guadalupe Hidalgo"). Through the Treaty of Guadalupe Hidalgo, the United States acquired sovereignty over certain regions of Mexico north of the Rio Grande, including the territory of New Mexico. *Id.* Article VIII of the Treaty provided that after cession the United States shall respect the property held by Mexican citizens in the ceded territory. *Id.* at 929-930. All lands acquired by the United States under the Treaty that had not been privatized at the date of the Treaty became part of the federal public domain with the United States as proprietor. *See United States v. Sandoval*, 167 U.S. 278, 296-97, 42 L.Ed. 168, 17 S.Ct. 868 (1897).

Prior to the Treaty, the antecedent sovereigns in the territory of New Mexico had made grants to two separate parties of a tract of land known as the "Vegas Grandes," located in what is now the State of New Mexico. The first grant was to Luis Maria Cabeza de Baca, on behalf of himself and seventeen of his male children, based upon a petition dated January 6, 1821. A subsequent grant was made to a group of settlers headed by Juan de Dios Maese, based upon a petition dated March 20, 1835. See Exhibit A to the Letter from the Secretary of the Interior communicating documents in relation to private land claims in New Mexico, H.R. Exec. Doc. No. 14, 36th Cong., 1st Sess. (1860) at 42-45 (hereinafter "Exec. Doc. No. 14"). The Baca family left the Vegas Grandes. The Vegas Grandes was eventually settled upon by several hundred families and became known as the town of Las Vegas. *See* S. Rep. No. 228, 36th Cong., 1st Sess. (1860).

The Act of July 22, 1854 established a process by which Congress would become the final arbiter of land claims in the territory of New Mexico, including the Vegas Grandes. *See* Act of July 22, 1854, Ch. 103, 10 Stat. 308 (1854); *Tameling v. United States Freehold & Emigration Co.*, 93 U.S. (3 Otto) 644, 23 L.Ed. 998 (1877); *see* Act of July 21, 1860, Ch. 167, 12 Stat. 71, 71-72 (1860) ("Act of 1860").

In accordance with the process established by the Act of 1854, the Surveyor-General of New Mexico reported to Congress that the Vegas Grandes had been separated from the federal public domain by either the grant to the Baca family or the competing grant to the town. He made no recommendation as to which of the rival claims should be confirmed or as to who had the right to the property, and instead referred that issue to Congress for such action as it deemed necessary and proper. *See* Exec. Doc. No. 14 at 45. After the Senate Committee on Private Land Claims reported that the Baca heirs had "expressed a willingness to waive their older title in favor of the settlers [of the town of Las Vegas], if allowed to enter an equivalent quantity of land elsewhere within the Territory," S. Rep. No. 228, 36th Cong., 1st Sess. (1860), Congress proceeded to resolve legislatively the competing claims. By the Act of 1860, Congress confirmed title to the Vegas Grandes in the town of Las Vegas, accepted the waiver by the Baca heirs, and allowed them to select an equal quantity of vacant land, not mineral, in the territory of New Mexico. *See* Act of 1860, §§ 3 and 6, 12 Stat. at 71-72; Exec. Doc. No. 14 at 2. Such land was to be selected by them in square bodies not exceeding five in number. *See* Act of 1860, § 6, 12 Stat. at 72. On December 12, 1862

the Baca heirs filed with the Surveyor-General of New Mexico one of the five locations of land. This selection was in the San Luis Valley and was referred to as the Baca Grant No. 4. *See Shaw v. Kellogg*, 170 U.S. 312, 315, 42 L.Ed. 1050, 18 S.Ct. 632 (1898). This land was surveyed in 1863, and in 1864 the title passed, pursuant to the Act of 1860, to the Baca heirs. *Id.* at 320-22, 342-43.

The Objectors contend that the Baca Grant No. 4 is not and never has been a Spanish or Mexican land grant, but rather it was conveyed by Congress out of the federal public domain to the heirs of Luis Maria Cabeza de Baca in settlement of their disputed and unconfirmed claim to a Spanish or Mexican land grant in New Mexico. It is their position that the Applicants' title has no attributes of a Spanish/Mexican land grant and that, instead, whatever rights they may have must be based on the Act of 1860 which authorized the conveyance of the Baca Grant No. 4 from the federal public domain to the Baca heirs. The Objectors submit that the terms of the conveyance of the Baca Grant No. 4 pursuant to the Act of 1860 did not include ownership of groundwater, and that as with other federal grants of public domain, water rights associated with such conveyances were determined by the law of the state or territory in which the lands lay. It is their position that, under the laws existing when the Baca heirs' took title to the Baca Grant No. 4, ownership of the land did not include ownership of the groundwater lying thereunder.

The Applicants argue that Congress did confirm the Baca heirs' claim to a Spanish/Mexican land grant. It is their position that although Congress gave the title of the Vegas Grandes to the town of Las Vegas and gave the

Baca heirs the right to select alternative land instead of the Vegas Grandes, Congress acknowledged that title to the alternative land so selected derived from the antecedent sovereign, and that land, therefore, had all the attributes of a land grant from an antecedent sovereign. According to the Applicants, ownership of the Baca Grant No. 4 therefore included ownership of all groundwater lying thereunder, notwithstanding the law existing at the time title to the land passed to the Baca heirs. It is also their position that, regardless of any limitations on Spanish/Mexican land grant water rights, by the Act of 1860 the federal government conveyed to the Baca heirs its title to all water underlying the Baca land. Finally, they contend that even if the Baca Grant No. 4 were a conveyance from the federal public domain and water rights were determined by local law and custom, the question of local law and custom existing at the pertinent time presents a question of fact and, therefore, summary judgment thereon would be improper.

The Court concludes that Claim Nos. 2 and 3 of the Application are ripe for summary judgment, in that there are no disputed issues of material fact that must be resolved to decide the motion, and the issues presented are solely questions of law and not fact. The Court concurs with the Objectors' position as set forth in their briefs, and rejects the Applicants' analysis. For this reason, and for all of the reasons stated by the Objectors in their briefs, it is hereby ordered that the Applicants' Claim Nos. 2 and 3 be and hereby are DISMISSED.

IT IS SO ORDERED this 5th day of July, 1990.

BY THE COURT:

/s/ Robert W. Ogburn
ROBERT W. OGBURN
Water Judge
Water Division No. 3
District Court
State of Colorado

DISTRICT COURT
WATER DIVISION 3
STATE OF COLORADO
Case No. 86-CW-46

PENDING MOTIONS

CONCERNING THE APPLICATION FOR WATER RIGHTS OF:

AMERICAN WATER DEVELOPMENT, INC., THE BACA RANCH COMPANY, AND THE BACA CORPORATION, IN SAGUACHE COUNTY

These matters came on for hearing on Thursday, July 5, 1990, at 9:00 a.m., in the courtroom, Alamosa County District Court, Alamosa, Colorado, before the HONORABLE ROBERT W. OGBURN, Judge of Water Division 3.

APPEARANCES:

JACK F. ROSS, DAVID C. HALLFORD, and JEFFERSON V. HOUPT, Attorneys at Law, SAUNDERS, SNYDER, ROSS & DICKSON, 707 – 17th Street, Suite 3500, Denver, Colorado 80202, appearing on behalf of American Water Development, Inc., The Baca Ranch Company, and The Baca Corporation.

JOHN CARLSON and WILLIAM A. PADDOCK, Attorneys at Law, CARLSON, HAMMOND & PADDOCK, 1700 Lincoln Street, Suite 3900, Denver, Colorado 80203, appearing on behalf of Rio Grande Water Users Association.

ROBERT F. HILL, DAVID W. ROBBINS, and WENDY H. BLOCK, Attorneys at Law, HILL & ROBBINS, 1441 – 18th Street, Suite 100, Denver, Colorado 80202, appearing on behalf of Rio Grande Water Conservation District.

LINDA E. WHITE, Assistant Attorney General, Department of Law, State of Colorado, 1525 Sherman Street, Third Floor, Denver, Colorado 80303, appearing on behalf of the State of Colorado.

* * *

[p. 118] THE COURT: If I can share with counsel and the audience a perception of history – and I recognize this is not part of this case. This is not evidence, but still I think it might be interesting in trying to understand this whole land grant question.

Mr. Ross talked about the interpretation of history and, of course, history is interpreted. The romanticization of western history that most of us are familiar with is being challenged today.

Today, historians with our present environmental concerns are beginning to talk about the ravaging and despoilment of the western landscape in the 19th Century by the eastern settlers that came into this part of the country, a different perspective perhaps, an interpretation, and we've also, I think, tended to romanticize the concept of Spanish land grants, but I'd like to share with you what one historian, Howard Roberts Lamar, has to say about Spanish land grants in his book, *The Far Southwest*, 1846 to 1912, beginning at page 139 of his book, and I paraphrase liberally.

(Reading) From the time of the Taos Rebellion of 1847, when Governor Bent was killed, [p. 119] until 1854 when Washington finally appointed a surveyor general for New Mexico, the title to all property in the territory had lain in uneasy status.

The United States, by the Treaty of Guadalupe Hidalgo of 1848, had promised to respect New Mexican holdings, but these were enormously complicated by the existence of three kinds of grants: one to a community, usually for grazing purposes; a second to an individual for some outstanding service such as the defense against wild Indians or as a reward for settling a new area; and a third to the various Indian pueblos.

There were further complications because such grants had been variously awarded by the King of Spain, the Republic of Mexico after 1822, and the provincial governor, particularly Manuel Armijo, in the five years before the American conquest.

When Surveyor General William Pelham arrived in Santa Fe in 1854, he must have been dismayed at the task facing him. Over 1,000 claims awaited settlement, of which 197 involved large private grants.

Moreover, many of the private holders overlapped one another. Outside of California and [p. 120] possibly French Louisiana, Americans had never before dealt with such complicated land questions.

At the same time, Congress had given Pelham such elaborate and burdensome instructions that he was actually hampered rather than helped by them.

One clause, for example, written into the Act which created his post declared, quote, Until final action of Congress on such claims, all land covered thereby shall be reserved for sale or other disposal by the government, close quote.

This was the equivalent of denying the existence of a public domain in New Mexico while at the same time it guaranteed that long legal battles climaxed by Acts of Congress would characterize the history of the New Mexican land system.

A paradise for lawyers and politicians had been created. Commented William Keeler: "The claims approved by Congress were generally those with the most persistent influence on the outside and the most powerful political influence on the inside."

And as if to clinch the necessity for lawyers in land settlement, the grants in their wording were so extraordinarily vague that a claim [p. 121] could be stretched to include an estate of almost imperial size.

Despite many difficulties, including faulty, hasty and fraudulent surveys and the refusal of many distrustful Spanish American grantees to cooperate, a number of grants had been confirmed by 1857.

In the process, however, the legal profession of Santa Fe had become involved in securing titles for their clients. And there were men whom Governor E. G. Ross described as "sharp, shrewd Americans . . . possessed of some local lore and with a large amount of cheek and an unusual quantity of low cunning and astuteness."

The first chief justice, Joab Houghton, erstwhile builder of the capitol, was also an attorney for twelve claimants, among them Ceran St. Vrain.

Later in the fifties Judge John S. Watts told a Congressional committee that he was handling 43 cases.

In the rush to clear title Carlos Beaubien and Guadalupe Miranda, two of the largest claimants, decided to take no chances. They hired three lawyers; Houghton, Wheaton, and Smith.

[p. 122] The old Taos merchant's dream of empire seemed to come true when Congress confirmed the grant in 1860. In doing so, however, Congress was guided by the Mexican Colonization Law of 1824, which limited the size of the grant to eleven square leagues for each claimant.

Had Congress stuck by this ruling, the solution of the New Mexican land question would have been relatively simple, but there were too many other Spanish and Mexican laws contradicting the 1824 statute. Shrewd lawyers began to stretch their clients' holdings on this basis until, as Governor Sheldon later remarked, the grants took on remarkable "India rubber quality."

The history of the scores of land-grant cases and their role in New Mexican history might be epitomized by a brief account of the most famous and notorious of all the tracts, the Beaubien-Miranda claim, which came to be called the Maxwell Land Grant.

In 1869 Maxwell asked for a new government survey and learned that by the 1824 Colonization Law his claim was 22 leagues, or roughly 97,000 acres.

The men who purchased Maxwell's Grant had even larger plans than Beaubien, St. Vrain, or [p. 123] Lucien Maxwell had envisaged.

Acutely aware of the vagueness of the grant, they hired W. W. Griffin, United States Deputy Surveyor of New Mexico, to survey the grant as a two million acre plot – in contrast to the 97,000 acres to which Congress and Secretary of the Interior Cox had limited it to in 1869.

Without waiting for confirmation, Wilson Waddingham, an English rancher connected with the new company, went to London and sold the grant to English purchasers.

Things had gone remarkably well for these bold American and British speculators. Then in 1871 the new Secretary of the Interior, Columbus Delano, once again ruled that the grant covered only 22 leagues or 97,000 acres.

Unless the company, now busily selling $5 million worth of stock on the European market, could suspend this ruling, its fate would be that of other great land frontier schemes.

To circumvent the 1824 Colonization Law and hostile Secretaries of the Interior, the company resorted to court action and Congressional influence.

Despite all that could be done, the [p. 124] company was in bankruptcy by 1875, but the legerdemain practiced by the New Mexicans interested in the company now became more subtle than ever. Having secured a state of bankruptcy from a friendly judge, the company's claim in 1877 was sold to cover a tax debt.

The Maxwell case was reopened and a new survey was subsequently ordered at the company's behest.

The company then gave the contract to two engineering innocents. After a swift and almost meaningless survey lasting only 22 days, they filed their reports, declaring that the grant was indeed nearly two million acres in size.

On May 19, 1879, a ten-year battle ended because of favorable court decisions and land-office rulings, and Land Commissioner Williamson issued patents of ownership in excess of 1,700,000 acres.

In the realm of the remaining land grants, the methods and successes of the Maxwell Company triggered other claimants and speculators into action.

At the same time that the Maxwell purchase was being made, Colorado speculators were buying [p. 125] the Las Animas – originally Vigil and St. Vrain – grant in southeastern Colorado. The Sangre de Cristo grant – Narcisco Beaubien, and Lee – was being sold to William Blackmore, an English investor with extensive holdings in the Southwest.

In less than a year the suspect Gervacio Nolan grant went to still another British investor. Once bitten, Blackmore became interested in the Cebolla and Conejos grants and the Canon de Chama claim.

To interest Eastern U. S. and European investors, impressive brochures were printed providing a resume of the documents relating to the grants, their possibilities, and always with the opinion of some prominent lawyer.

In the decade from 1875 to 1885, the remaining unconfirmed grants continued to stretch impressively. When George W. Julian took over the surveyor general's duties in the latter year, he was shocked to find that the Canada Ancha grant, which originally had been for 130 acres – less than a quarter section – was now a claim for 375 square miles.

Others were even more spectacular: The Canon De Chama grant of 184,000 acres was increased [p. 126] by the claimants and preceding surveyor generals to 472,000 acres; the Tierra Amarilla grant was by then some 932 square miles, while the Mora claim was for a mere 1400 square miles.

Counting the Maxwell grant, some 34 claimants alone declared their holdings to be over 100,000 acres each.

The land grants had become the territory's largest industry.

Again, I emphasize that's not evidence in this case. That's an interpretation of the history of our Spanish land grants by one particular historian, but still it adds a flavor and, hopefully, an understanding as to what was going on with the Spanish land grants.

After listening to counsel argue the Spanish land grant question and the interpretation of the 1860 question involving local custom, I'm reminded of the old adage: When one has the facts, argue the facts. When one has the law, argue the law. And when one has neither, just argue.

The argument has been ably done. I am persuaded that, with respect to these issues, the Applicants have neither the facts or the law on their side.

[p. 127] Accordingly, the Court grants the Objectors' motion to summarily dismiss Applicants' claims 2 and 3 for all of the reasons argued by Objectors, rejecting all of the arguments advanced by the Applicants, and a formal order will issue as submitted by the Objectors.

We'll be in recess until 1:15 when we'll take up the remaining issues.

(Proceedings recessed at 12:15 p.m. to reconvene at 1:15 p.m.)

* * *

DISTRICT COURT, WATER DIVISION 3, COLORADO

CASE NO. 86-CW-46

ORDER

CONCERNING THE APPLICATION FOR WATER RIGHTS OF:

AMERICAN WATER DEVELOPMENT, INC.,

IN ALAMOSA, CONEJOS, COSTILLA, HINSDALE, MINERAL, RIO GRANDE AND SAGUACHE COUNTIES.

THIS MATTER came before the Court on Applicant's Motion to Dismiss Claim Set Forth in Part IV of the Amended Application. The Court, having considered the Motion, the briefs submitted by the Applicant and Objectors, affidavits submitted by the parties, and having heard oral argument, hereby finds as follows:

1. The Application in this case was filed on December 31, 1986. By order dated October 8, 1990, the Court permitted the Applicant to file an amended application provided that there "shall be no further amendments to or supplementation of the Application herein. . . . " Both the Application and Amended Application claimed the right "to tributary ground water established by appropriation pursuant to Colorado law." Application, Part IV at 15-16; Amended Application, Part IV at 9-12 ("Tributary Claim"). Up until the time it filed this motion, the Applicant consistently represented and took actions that indicated it fully intended to proceed to trial on the Tributary Claim aspect of these applications.

2. On July 11, 1990, the Court entered a Case Management Order which, among other things, set this case for trial beginning October 15, 1991.

3. Extensive and vigorous discovery has occurred throughout the nearly five years this case has been pending. Objectors have submitted affidavits which attest to the facts that nearly 100 individuals have been deposed by the parties, nearly 100,000 pages of documents have been produced by the parties during the course of discovery, and approximately 50 individuals have been identified and deposed as expert witnesses. Objectors, the Rio Grande Water Conservation District, the Rio Grande Water Users Association, the Conejos Water Conservancy District, and the United States of America have also submitted affidavits indicating that they have incurred attorneys' fees, litigation expenses, and expert witness fees and costs in excess of two million dollars in defending against the Application and the Amended Application, including the Tributary Claim the Applicant now seeks to dismiss without prejudice.

4. Applicant filed its motion to dismiss its Tributary Claim on September 26, 1991, during the course of the pretrial conference held in this case. Applicant advanced four reasons for its filing, three of which relate to prior rulings of this Court and one of which relates to the Applicant's inability to prove a requisite element of its Tributary Claim, the existence of an agency relationship with a third party for use of the water.

5. The Applicant brought its motion pursuant to Colo. R. Civ. P. 41(a)(2). This rule states, in pertinent part, that "an action shall not be dismissed at the plaintiff's

instance save upon order of the court and upon such terms and conditions as the court deems proper." The Applicant asserts that its motion is proper under this rule.

6. The decision whether or not to grant Applicant's motion is within the discretion of this Court. *Tillery v. District Court*, 692 P.2d 1079, 1085 (Colo. 1984). As terms and conditions of the dismissal, the trial court may award costs and fees to the Objectors. *Id.* at 1084.

7. The language of Colo. R. Civ. P. 41(a)(2) and the corresponding Federal Rule are identical. The Colorado Supreme Court has relied upon federal authority to construe this rule and for other rules of procedure containing the same or similar language as the corresponding federal rule. Therefore, it is appropriate to rely upon federal authority construing that rule in ruling upon Applicant's motion. *Tillery*, 692 P.2d at 1084.

8. There are a number of factors to be considered in evaluating a Rule 41(a)(2) motion to dismiss. They include the following: (1) defendants' efforts and expense involved in preparing for trial; (2) excessive delay and lack of diligence on the part of the plaintiff in prosecuting the suit; (3) the fact that the motion is filed at a critical juncture in the case; (4) plaintiff's diligence in bringing the motion; (5) insufficient explanation of the plaintiff's need to take a dismissal; and (6) prejudice resulting from uncertainty to title to real property. *See Zagano v. Fordham Univ.*, 900 F.2d 12, 14 (2d Cir. 1990); *Ferguson v. Eakle*, 492 F.2d 26, 29 (3d Cir. 1974); *Pace v. Southern Express Co.*, 409 F.2d 331, 334 (7th Cir. 1969); *Holbrook v. Anderson Corp.*, 130 F.R.D. 516 (D.Me. 1990).

9. Most, if not all, of the factors listed in paragraph 8 above are present here.

10. When a motion to dismiss without prejudice is filed close to the start of trial and after the defendant have been put to the expense of preparing for trial, such a motion will ordinarily only be granted upon the condition that the plaintiff reimburse the defendant for the expenses of litigation, including attorneys' fees. *McCants v. Ford Motor Co.*, 781 F.2d 855, 860 (11th Cir. 1986); *Yoffee v. Keller Industries, Inc.*, 580 F.2d 127 (5th Cir. 1978), *cert. denied*, 440 U.S. 915 (1979); *Radiant Technology Corp. v. Electrovert*, 122 F.R.D. 201, 215 (N.D.Tex. 1988); *Goldlawr, Inc. v. Shubert*, 32 F.R.D. 467, 469-70 (S.D.N.Y. 1963). *See also Tillery*, 692 P.2d at 1084.

11. Voluntary dismissal under Colo. R. Civ. P. 11 is not a bar to an award of attorneys' fees made as a term and condition of dismissal pursuant to Rule 41(a)(2). Here, the Applicant proceeded under Rule 41(a)(2) and is subject to imposition of appropriate terms and conditions as part of the requested dismissal without perjudice.

12. The Court finds that absent the imposition of appropriate terms and conditions, the Objectors will suffer legal prejudice that would otherwise result from the dismissal without prejudice.

IT IS THEREFORE ORDERED as follows:

1. The Applicant's Motion to Dismiss without prejudice is granted subject to the condition that it pay to Objectors all of their attorneys' fees, expert witness fees and costs, and other fees and expenses related to the Tributary Claim.

2. A hearing to determine the amount of such fees and costs which will be ordered paid by the Applicant shall be held immediately following the trial on the non-tributary claim. The Court will at that time consider the reasonableness of those fees and costs and the necessity of those expenditures.

3. The entry of this Order shall not limit the Objectors' right to seek an award of expenses, including attorneys' fees, pursuant to Colo. R. Civ. P. 11 or for attorneys' fees pursuant to Colo. Rev. Stat. §13-17-102 (1990).

DATED: November 21, 1991 nunc pro tunc
October 10, 1991

BY THE COURT:

/s/ Robert G. Ogburn
ROBERT G. OGBURN
Water Judge
Water Division No. 3
State of Colorado

DISTRICT COURT, WATER DIVISION 3, COLORADO

Case No. 86 CW 46

REPORTER'S TRANSCRIPT

CONCERNING THE APPLICATION FOR WATER RIGHTS OF:

AMERICAN WATER DEVELOPMENT, INC., THE BACA RANCH COMPANY, AND THE BACA CORPORATION, IN SAGUACHE COUNTY.

The pretrial hearing in this matter commenced on Thursday, October 10, 1991, before the HONORABLE ROBERT W. OGBURN, District Judge within and for the 12th Judicial District, State of Colorado.

APPEARANCES:

FOR THE APPLICANT: JACK ROSS
WILLIAM KIRVEN
DAVID HALLFORD
THOMAS CRABB

FOR THE OBJECTORS: JOHN HILL
JIM DU BOIS
WILLIAM PADDOCK
DAVID ROBBINS
CHRISTINE KLEIN
BRAD CAMERON
FRED BAUDER

[p. 2] MORNING SESSION, THURSDAY, OCTOBER 10, 1991

(The court convened with all parties present, and the following proceedings were had:)

THE COURT: Good morning. Be seated, please. This is 86 CW 46, the AWDI application for water rights. This is a continuation of the hearing from last week. After disposing of a number of motions, the applicants filed a motion to dismiss Part IV of their tributary claim, and that hearing was continued to today. Both sides have filed briefs.

* * *

[p. 73] THE COURT: Objector in their brief in opposition to the motion to the – to dismiss the tributary claim is Dickensonian in its preliminary observations, and I guess I'd like to share that with everyone who hasn't read the brief. "Applicant does not have the right to simply abandon one of its two remaining claims on the courthouse steps on the eve of trial like an unwanted infant at the orphanage, only to be reclaimed at some later date," shades of Oliver Twist. We've got in the past a lot of the rhetoric in the briefs.

The parties have responded to my questions – the parties. The objectors have responded to my question, what were they really asking for, because quite frankly it was not clear until this morning what the objectors' position is. We now seem to have a unified position on the part of the objectors that plaintiff's or applicant's motion should be dismissed without prejudice and it will.

The question then remains should the Court impose reasonable terms and conditions along with the dismissal of Part IV of the application, and the Court concludes that

it should. I disagree with the applicant that there is somehow only some kind of legal injury or legal test that must apply. It's evident from the cases cited, concededly all federal cases, but *Tillery*, which is the touchstone in Colorado, relies on federal interpretation.

[p. 74] This is not an unusual position for our state Supreme Court to take. They have taken that position looking to federal authority on numerous occasions on numerous questions, particularly with respect to the interpretation of federal rules vis-a-vis state rules of procedure. In many instances they are identical.

It would appear that Rule 41 of the federal rules and Rule 41 of the state rules are identical. Looking at the federal authority side, it's obvious that the factors the Court was considering in evaluating a Rule 41(a)(2) motion to dismiss include the defendants' efforts and expense involved in preparing for trial, excess delay and lack of diligence on the part of the plaintiff in prosecuting the suit, the fact that the motion is filed at a critical juncture in the case, plaintiff's diligence in bringing the motion or lack of diligence, insufficient explanation of the plaintiff's need to take a dismissal, and prejudice that may result from uncertainty to title in real property.

The cases cited are in AWD – or in objectors' brief at page 8. Other matters to be considered, I think are the vigorous discovery that has occurred, plaintiff's or applicant's counsel's representations that this matter would proceed to trial on Part I and Part IV, the extent of resources defendants have spent – defendants – objectors have spent in preparing for trial and any inadequacy of applicant's proffered [p. 75] reasons.

I am satisfied that most, if not all of these situations exist. I will not attempt to simply regurgitate the history of this case at this time, but it's obvious to everyone that we have almost five years of litigation in this matter. I has been time consuming and extremely expensive on the part of both sides. As a condition to the dismissal of Part IV of the application, terms and conditions will be imposed requiring the applicant to pay to objectors, and there may be other objectors.

Off the top of my head I can think of, I think, Mr. McMillen who's sort of in and out of this case, represents several objectors. I don't know what kind of costs or expenses may be incurred there, but I don't want to limit this just to the objectors who are here present in court today. But the applicant will pay to objectors all attorney fees and expert witness fees and other fees and expenses incurred by the objectors that are otherwise appropriate during the pendency of this litigation which relate to the tributary claim.

Needless to say, this will require a hearing subsequent to the trial in this matter because we don't have all of the information yet, and it needs to be subjected to a reasonable and necessary test, and this will be done. The parties may claim, by way of an example, 2 million dollars.

* * *

DISTRICT COURT, WATER DIVISION 3, COLORADO

Case No. 96-CW-46

TRANSCRIPT OF PROCEEDINGS VOLUME XVIII

NOVEMBER 21, 1991

CONCERNING THE APPLICATION FOR WATER RIGHTS OF:

AMERICAN WATER DEVELOPMENT, INC., THE BACA RANCH COMPANY AND THE BACA CORPORATION, IN SAGUACHE COUNTY.

BE IT REMEMBERED that the above-entitled matter came on for trial on the 21st day of November 1991, before the HONORABLE ROBERT W. OGBURN, sitting in Water Division Three, Alamosa County, Colorado.

* * *

[p. 6275] THE COURT: Let's go back on the record.

Applicant's Motion for Order Granting Applicant Due Process in Form of Notice, Evidentiary Hearing, Discovery and Establishing the Issues and Procedure for the Same. That's still outstanding. You folks were going to give me a reply?

* * *

[p. 6277] Now, if your reply and your argument persuades me somehow we have to back up, fine and good; we will back up. But for the moment I'm making the assumption that your motion is going to go down in

blazing technicolor and we are going to forward, subject to the power of persuasion of your writing and oratorical skills. I'm not going to just let this thing get away from me.

* * *

DISTRICT COURT, WATER DIVISION 3, COLORADO

Case No. 86-CW-46

TRANSCRIPT OF PROCEEDINGS VOLUME XXIX

NOVEMBER 22, 1991

CONCERNING THE APPLICATION FOR WATER RIGHTS OF:

AMERICAN WATER DEVELOPMENT, INC., THE BACA RANCH COMPANY AND THE BACA CORPORATION, IN SAGUACHE COUNTY.

BE IT REMEMBERED that the above-entitled matter came on for trial on the 22nd day of November 1991, before the HONORABLE ROBERT W. OGBURN, sitting in Water Division Three, Alamosa County, Colorado.

* * *

[p. 6503] THE COURT: Motion for a jury trial is denied.

With respect to the motion for an order granting applicant due process, formal notice of evidentiary hearing, discovery establishing issues of [p. 6504] procedure for the same, the motion is denied for the most part, will be granted in limited part.

Quoting from Radiant Technology Corp. versus Electrovert USA, the Federal District Court for the Northern District of Illinois 122 F.R.D. 201 in 1988, "Rule 41(a)(2) provides that, except as permitted under Rule 41(a)(1), a district court shall not dismiss an action at the plaintiff's instance 'save upon order of the court that upon such terms and conditions as the court deems proper'.

"The basic purpose of Rule 41(a)(2) is to freely permit the plaintiff, with court approval, to voluntarily dismiss an action so long as no other party will be prejudiced.

"Allowing the court to attach conditions to the order of dismissal prevents defendants from being unfairly affected by such dismissal.

"The decision to dismiss an action rests within the sound discretion of the district court.

"In determining whether to grant a dismissal, the principal consideration is whether the dismissal would prejudice the defendant. If a dismissal would unfairly prejudice the defendant, then the plaintiff's motion to dismiss should be denied.

"When considering a dismissal without [p. 6505] prejudice, the court should keep in mind the interests of the defendant, for it is his position which should be protected.

"The defendant must demonstrate that the dismissal will cause 'some plain legal prejudice other than a mere prospect of a second lawsuit'.

"Outright dismissal should be refused, however, when a plaintiff seeks to circumvent an expected adverse result," skipping around in the decision.

"Two factors which appear regularly to be considered, and which the court deems pertinent to the exercise of its own discretion, are the defendant's effort and expense in preparing for trial and whether there have been excessive delays or a lack of diligence on the part of the plaintiff or prosecuting the case."

One matter which concerns me, I don't mind saying, is that it was evident to the Court at the close of this case that if the modelers could, they would still be punching numbers out on their machines.

When this action was filed in 1986, there was some kind of a model in place, but it is evidently clear from the testimony that for the last five years everyone has been going crazy trying to bring them up to date and up to speed with more information and more data.

[p. 6506] I appreciate why you didn't like my trial management order now. I never understood it before. You wanted all the Objectors' information so you could plug it into your program with a state-of-the-art presentation, if you will; although they didn't bring the action. You brought the action. And presumably, at least I presumed, that when you filed this action, you knew what you were doing and you knew what you had.

And it's evident to me that in 1986 you didn't know what you were doing and you didn't know what you had, and I'm not sure at this point if you know what you have. One might suggest that that constitutes some form of inordinate delay.

"The first factor," continuing "includes an evaluation of the amount of discovery and the extent to which curious pretrial motions have been filed.

"A district court may reasonably impose attorney's fees and costs as a condition for dismissal where, at plaintiff's instance, the litigation will not result in a merits resolution.

"The second factor includes a determination whether there have been excessive delays or a lack of diligence on the part of the plaintiff in prosecuting the case.

"This factor incorporates an assessment [p. 6507] whether the defendant has been harmed by the delay and whether the defendant has been prejudiced by the uncertainty of pending litigation."

Applicants have characterized Radiant Technology as an aberrant decision. I don't find it to be so. I find it quite persuasive.

With respect to going back to square one, I have no intention of doing so. I entered an order back on October 10 after the Applicant requested a hearing; they got a hearing on October 10. You folks knew what Rule 41 said, that it didn't take a genius to figure out that I might consider terms and conditions. That's what Rule 41 says I may do. We talked about it at that hearing, and then you took your good, old, sweet time, 33 days, to file this particular motion.

I don't think it was timely filed, but aside from that, I don't think you are entitled to what you are seeking in that motion.

We are not going to go back and relitigate each and every imagined grievance you think that you may have suffered because you filed the motion to voluntarily dismiss your trib claim.

We will provide for procedures to determine your reasonableness and appropriateness of the claim for the award for costs and fees, including [p. 6508] attorney fees, as I've previously ruled following the federal

authority that has been presented to me, recognizing that Tillery doesn't spell out the question of attorney fees and that it's not absolutely cast in stone in the state of Colorado. Yet, we will develop law in the state of Colorado on that point.

My decision is based on the applicable federal decisions in place at this time, which I find persuasive in the absence of definitive Colorado law.

The Objectors shall file their bill of costs concerning these matters by Wednesday evening 5 o'clock. I assume you don't intend to work on Thursday. Applicants will have 30 days in which to respond. The information furnished by the Objectors' counsel will be treated as confidential and the confidentiality order in place will apply to these matters.

Objectors will have 15 days to reply – or respond – respond, reply, it's getting late. I will then set up a teleconference with counsel to set a hearing date if one is needed on these matters.

No formal discovery as contemplated by Applicants will be allowed.

MR. ROSS: I beg your pardon, but what?

THE COURT: Will not be allowed. Anything [p. 6509] further?

MR. ROSS: Yes, your Honor. I believe we would like to have a ruling on our offer of proof.

THE COURT: In what respect, Mr. Ross?

MR. ROSS: Well, we made an offer of proof. Is the Court going to accept it or deny it?

THE COURT: I thought it was implicit in my ruling that it was denied.

MR. ROSS: That's all we needed to know.

THE COURT: All right. Anything further?

* * *

DISTRICT COURT, WATER DIVISION NO. 3, STATE OF COLORADO

CASE NO. 86CW46

ORDER

CONCERNING THE APPLICATION FOR WATER RIGHTS OF AMERICAN WATER DEVELOPMENT, INC.

IN ALAMOSA, CONEJOS, COSTILLA, HINDSDALE, MINERAL, RIO GRANDE AND SAGUACHE COUNTIES.

THIS MATTER having come on before the Court on the Applicant's Motion for a Prehearing Conference and Oral Argument on the Issue of Entitlement, and the Court having considered the responses of the Objectors and the files of this case, HEREBY ORDERS as follows:

1. The Applicant's request for oral argument on the issue of entitlement is denied. The issue of entitlement has already been determined by this Court pursuant to its Order of November 21, 1991, *nunc pro tunc* October 10, 1991. The Applicant's argument based on the grounds of pre-emption or abrogation is without merit and does not provide a basis for the Court's reconsideration of the issue of entitlement.

2. This Court will hold a hearing to determine a reasonable amount of attorneys fees and litigation related expenses, if any, to be awarded the Objectors arising from the dismissal of the tributary claim in this case. At that time the parties may present evidence they deem appropriate to the basis and reasonableness of the fees

and expenses claimed including whether any mitigation was appropriate or possible and would have reduced the fees and expenses claimed by the Objectors.

3. The Court further Orders that up to two days will be set aside for the hearing on April 21, 1992, beginning at 9:00 a.m. at Alamosa, Colorado.

DATED this 16th day of March, 1992.

BY THE COURT:

/s/ Robert W. Ogburn
ROBERT W. OGBURN
Water Judge
Water Division No. 3
State of Colorado

DISTRICT COURT, WATER DIVISION 3, COLORADO

Case No. 86CW46

REPORTER'S TRANSCRIPT

CONCERNING THE APPLICATION FOR WATER RIGHTS OF: AMERICAN WATER DEVELOPMENT, INC., THE BACA RANCH COMPANY, AND THE BACA CORPORATION, IN SAGUACHE COUNTY.

The hearing in this matter commenced on March 16, 1992, before the HONORABLE ROBERT W. OGBURN, Water Judge within and for Water Division 3, State of Colorado.

APPEARANCES:

FOR THE APPLICANT:	JOSEPH M. MONTANO
FOR THE OBJECTORS:	
RGWUA:	WILLIAM PADDOCK
RGWCD:	KAREN TOMB
STATE OF COLORADO:	BRAD CAMERON

* * *

[p. 8] THE COURT: The applicant's request for prehearing conference and oral argument on the issue of entitlement is also denied. We've argued in one way or the other the question of entitlement, Mr. Montano, now on two or three or four occasions. I don't know. It keeps coming up, and I know you're getting into the ball game a little late on that; but up front, I've ruled that the

objectors – under the Rule 41 motion to voluntarily dismiss the tributary claim, it was conditioned without objection, at the time, on the payment – not only without objection, but the applicant conceded that the Court had the authority to award reasonable fees and costs.

There's a real question, of course, as to what reasonable fees and costs encompass. We've had lengthy discussions about the lack of state law interpreting this – the scope and depth of this under Rule 41, and I've ruled in the past that my ruling and my decision in this regard is going to be based on ample federal authority, recognizing that there's limited state authority; and until our appellate courts feel that they want to take a different tactic from the federal line of authority, which, of course, is their prerogative, I am persuaded by the line of federal authority.

* * *

SUPREME COURT, STATE OF COLORADO
CASE NO. 92SA141 AND 92SA263
Appeal from the District Court, Water Division #3, 86CW46

ORDER OF COURT

92SA141

AMERICAN WATER DEVELOPMENT, INC.,

Applicant-Appellant,

vs.

CITY OF ALAMOSA, et al.

Objectors-Appellees.

==========

92SA263

AMERICAN WATER DEVELOPMENT, INC.,

Applicant-Petitioner,

v.

RIO GRANDE WATER CONSERVATION DISTRICT, et al.,

Objectors-Respondents.

Upon consideration of the Petition for Rehearing filed in the above cause, and now being sufficiently advised in the premises,

IT IS THIS DAY ORDERED that said Petition for Rehearing shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, JUNE 6, 1994.
Justice Scott does not participate.
[SEAL]

DISTRICT COURT, WATER DIVISION 3, COLORADO
CASE NO. 86CW46

APPLICATION FOR UNDERGROUND WATER RIGHTS OR, IN THE ALTERNATIVE, FOR THE DETERMINATION OF RIGHTS TO NONTRIBUTARY GROUNDWATER OUTSIDE OF DESIGNATED GROUNDWATER BASINS

CONCERNING THE APPLICATION FOR WATER RIGHTS OF:
AMERICAN WATER DEVELOPMENT, INC., THE BACA RANCH COMPANY,
THE BACA CORPORATION, IN SAGUACHE COUNTY.

(Filed Dec. 31, 1986)

Summary. This application involves substantial groundwater claims for wells located on what is known as the Luis Maria Cabeza de Baca Grant No. 4 (92 deep wells), as well as those located on certain lands to the west of the grant near the town of Moffat (9 deep wells) near Villa Grove (11 deep wells). The claims are made under four *alternative* bases:

(1) Pursuant to Section 37-92-203, C.R.S., a part of what is commonly referred to as S.B.5 (1985), insofar as the water claimed may be *non*tributary;

(2) Pursuant to the *Spanish and Mexican law* as recognized and affirmed by the United States, with respect to all underground water, whether tributary or otherwise;

(3) Pursuant to the *absolute grant made by the United States,* evidenced by the Act of June 21, 1860,

with respect to all underground water, whether tributary or otherwise; and

(4) Pursuant to Section 37-92-101, C.R.S., et seq., insofar as the water claims herein may be *tributary.*

GENERAL ALLEGATIONS

1. Name, address, telephone number of applicants:

American Water Development, Inc.
The Baca Ranch Company
The Baca Corporation
Suite 2950
1099 18th Street
Denver, Colorado 80202
(303) 294-9422

American Water Development, Inc., and the Baca Ranch Company are wholly-owned subsidiaries of The Baca Corporation, formerly First Delaware-Colorado Corporation, formerly First Colorado Corporation d/b/a First Delaware-Colorado Corporation.

2. Names of wells and permit, registration, or denial numbers:

A. Wells (hereinafter "Baca Wells") located on the Luis Maria Cabeza de Baca Grant No. 4 (hereinafter sometimes "the Grant"): BA-1 through BA-65, excepting the Moffat wells as described below; BG-1 through BG-6; BS-1 through BS-5; BI-1 through BI-25.

B. Wells (hereinafter sometimes referred to as the "Moffat Wells") located to the west of the Grant and southwest of the town of

Moffat: BA-51, 52, 53, 54, 56, 57, 60, 61 and 62.

C. Wells located in the area of Town of Villa Grove (hereinafter "Villa Grove Wells"): VG-1 through VG-11.

D. Wells in all categories are hereinafter sometimes collectively referred to as "the Wells."

3. Legal description of wells:

The legal description of the Wells are given on Exhibit A hereto. Maps showing their locations are included in Exhibit A, which is comprised of seven plates. Applicants request the right to change the location of any proposed well from the location described in Exhibit A to any point within 200 feet of the location described below without the necessity of amending this application, republishing any such change, or petitioning the Court for the reopening of any decree entered herein. Each well is claimed as an alternate point of diversion for all other wells. With respect to the claims set forth in Parts I, II, and III, below, in addition to the Wells described above, applicants may need to construct additional, supplemental, replacement, or alternate point of diversion wells to recover the entire amount of water from the Aquifer to which they are entitled. Applicants request the right to construct such additional, supplemental, replacement or alternate point of diversion wells as are necessary in order to maintain production of the amounts of water to which they are entitled by virtue of their ownership of the land.

4. A. Source: Underground water in the San Luis Valley Aquifer, herein sometimes referred to as "the Aquifer."

B. Depth: Perforated from 200 feet to 2,500. These depths are approximate and will vary according to the actual topographic locations of the wells and the saturated thickness of that part of the aquifer penetrated by each well.

5. A. Date of appropriation: April 21, 1986, applicable only to the claims set forth in Part IV, below.

B. How appropriation was initiated: Corporate resolution and field survey.

C. Date water applied to beneficial use: N/A

6. Amount claimed: 5,000 g.p.m. per well ( ) Absolute (X) Conditional, with respect to the claims set forth in Part IV, below. With respect to the claims in Parts I, II, and III, the rate set forth above is a nominal pumping rate and applicant requests the right to exceed the nominal pumping rate associated with each well to the extent necessary to withdraw the total number of acre feet which applicants are entitled to withdraw from each well each year.

7. If well is nontributary: (applicable only to Part I below)

A. Name of Aquifer: The San Luis Valley Aquifer, hereinafter sometimes referred to as "the Aquifer."

B. Amount claimed in acre feet annually: 200,000 a.f.

8. Proposed Use.

A. If irrigation:

(1) Number of acres historically irrigated: none from the Wells.

(2) Total number of acres proposed to be irrigated: approximately 38,000

(3) The legal description of the land irrigated: *see* Exhibit B.

(4) Area of lawns and gardens irrigated: unknown.

B. If non-irrigation, describe purpose fully:

Applicants intend to use the water which is the subject of this application as a water supply for the land, for such property as applicants may subsequently acquire and for such other property as applicants may choose to serve. The water contained in the Aquifer that is the subject of this application will be used in a unified water system, reused, successively used, and otherwise disposed of for municipal, domestic, industrial, commercial, fire protection, irrigation, stockwatering, recreation, fish and wildlife preservation and propagation, and all other beneficial uses. Said water will be produced for immediate application to beneficial use, for storage and subsequent application to beneficial use, for exchange purposes, for replacement of depletions, and for all other augmentation purposes including taking credit for all return flows resulting from the use of said water as augmentation for or as an offset against any out-of-priority tributary groundwater depletion. Applicant claims the rights set forth in this paragraph for themselves, their successors, assigns, lessees and contractors.

9. Name and address of owner of land on which the Wells are located:

The Baca Ranch Company
1099 18th Street
Suite 2950
Denver, Colorado 80202

10. Remarks:

The instant application is a claim only for that certain underground water described herein, without prejudice to any future uses, claims for or applications for surface waters or underground waters which are not claimed hereby, including additional underground waters from the Lands subject to this application. Copies of this application and the exhibits thereto may be obtained free of charge by written request to the applicants at the address set forth in paragraph 1, above.

PART I:

DETERMINATION OF RIGHTS OF NONTRIBUTARY GROUNDWATER OUTSIDE OF DESIGNATED GROUNDWATER BASINS.

11. Applicants hereby incorporate by this reference, as appropriate, the allegations of paragraphs 1 through 10, above.

12. This Court has jurisdiction to make "determinations of rights to nontributary groundwater outside of designated groundwater basins." Section 37-92-203, C.R.S., (as amended).

13. None of the Wells involved in this application, which are specifically described in Exhibit A, hereto, are located in a designated groundwater basin as defined in Section 37-90-103(7), C.R.S.

14. The groundwater to be withdrawn through the Wells is "nontributary groundwater" as defined in Section 37-90-103(10.5), C.R.S., set forth in pertinent part below.

> "Nontributary ground water" means that ground water, located outside the boundaries of any designated ground water basins in existence on January 1, 1985, the withdrawal of which will not, within one hundred years, deplete the flow of a natural stream, including a natural stream as defined in sections 37-82-101 (2) and 37-92-102 (1) (b), at an annual rate greater than one-tenth of one percent of the annual rate of withdrawal.

15. Although the Wells are subject to the permit requirements of Section 37-90-137(4), C.R.S., applicants have not applied for permits to drill them. Prior to constructing any well pursuant to the terms of the decree entered hereon, applicant will apply to the State Engineer for a construction permit.

    a. The withdrawals claimed in this application are based upon the quantity of groundwater, exclusive of artificial recharge, underlying the land described in Exhibit C (hereinafter the "Land"), which Land is owned by Applicants or by parties who have consented in writing to Applicant's withdrawals.

    b. The withdrawals claimed in this application are based on an aquifer life of one hundred years beneath the Land, as described in Exhibit C.

16. This application will be supplemented by evidence that the State Engineer has issued or failed to issue, within four months of filing of the application in this Court, a determination as to the facts of the application. Pursuant to Section 37-92-302(2), C.R.S., the

determination shall be made by the State Engineer upon his receipt from the water clerk of a copy of the application and no separate filing or docketing with the State Engineer is required.

WHEREFORE, applicant requests that this Court enter a decree:

A. Granting the relief sought in this part of the application and determining, adjudicating and confirming applicants' rights to the nontributary groundwater contained in the Aquifer underlying the land.

B. Specifically determining as a matter of hydrological and geological fact that unappropriated groundwater in the amounts specified in paragraphs 6 and 7 is available for withdrawal by the Wells described in paragraphs 2 and 3; that no vested or decreed conditional water right will be materially injured by such withdrawals; that the withdrawal of groundwater from the Aquifer in the amounts to which applicant is determined to be entitled will not, within 100 years, deplete the flow of a natural stream at an annual rate greater than one tenth of one percent of the annual rate of withdrawal; and ordering that the State Engineer shall, therefore, issue well permits for the Wells described in paragraphs 2 and 3 at such time as the applicants apply for them.

C. Specifically determining the number of acre-feet of nontributary groundwater estimated to be available for withdrawal by the Wells described in paragraphs 2 and 3 on an average annual basis.

D. Specifically determining that applicants' full annual acre-foot entitlement of nontributary

groundwater from that part of the Aquifer underlying each parcel may be produced through any combination of the Wells described in paragraphs 2 and 3; that the pumping rates for said Wells may exceed the pumping rate specified in paragraph 6 or specified in any future determinations for designating additional wells as supplemental or alternate points of diversion, in order to produce said full acre-foot allocation of water from the aquifer; and ordering that applicants are entitled to withdraw from any combination of the Wells, including any additional, supplemental, replacement, or alternate point of diversion wells, an amount of groundwater in excess of the annual amount decreed from that part of the Aquifer underlying each parcel, so long as the sum of the total withdrawals from all of the wells in each aquifer on a parcel in any one year does not exceed the product of the number of years since the date of issuance of the original well permits or the date of entry of a decree herein, whichever occurs first, and the annual volume of water which applicants are entitled to withdraw from that part of that Aquifer underlying that parcel.

E. Specifically determining that applicants may change the location of any of the Wells described in paragraphs 2 and 3 from the locations described in paragraph 3 to any point within 200 feet of the described location without the necessity of filing any amendment to this application, republishing any such change, reopening any decree herein, or reapplying for a construction permit from the State Engineer.

F. Specifically determining that applicants have the right to use, reuse, successively use and

dispose of, to extinction, the waters which are the subject of this application in any manner whatsoever.

G. Specifically determining that the return flows resulting from the use of the water which is the subject of this application may be used to replace out-of-priority depletions under a plan or plans for augmentation.

H. Directing the State Engineer to issue permits for the Wells described in paragraphs 2 and 3 upon the request of applicants, at such time as applicants are ready to construct any of the Wells, and to grant such permits as are necessary for any additional, supplemental, replacement or alternate point of diversion wells required for applicants to withdraw the amount of nontributary water from the Aquifer to which they are entitled.

I. Specifically determining that, for the purposes of applying Section 37-90-137(10), C.R.S., the standards of Section 37-90-137(4), C.R.S., shall be applied as if the application for a permit for any additional, supplemental, replacement or alternate point of diversion well was filed on the same date as the application for a permit for the original well.

J. Ordering that the amount of water determined by the Court to be available for withdrawal by the wells described herein shall control the determination of the quantity of annual withdrawal allowed in any well permits issued by the State Engineer.

K. Specifically determining that the Applicants are the owners of the Land or that it is owned by

parties who have consented in writing to Applicants' withdrawals in accordance with Section 37-90-137(4)(b) (II) (A), C.R.S. (as amended by S.B. 5), and specifically determining that applicants have the sole right to withdraw all of the legally available groundwater in the Aquifer underlying the Land based on an Aquifer life of one hundred years.

L. Specifically determining that the nontributary groundwater which is the subject of this application shall not be administered in accordance with priority of appropriation, that no date of initiation of the withdrawal project is required, that such groundwater is not subject to the requirements of Section 37-92-301(4), C.R.S., concerning findings of reasonable diligence, and that applicant shall not be required to make application to the Court for findings of reasonable diligence regarding such groundwater.

M. Granting such other relief as the Court deems proper in this case.

PART II:

DETERMINATION OF RIGHTS TO GROUNDWATER BASED ON SPANISH AND MEXICAN LAW AS RECOGNIZED AND AFFIRMED BY THE UNITED STATES.

17. Applicants hereby incorporate by this reference, as appropriate, the allegations of paragraphs 1 through 10, above.

18. On January 16, 1821, for the purpose of cultivating the soil, advancing the interests of agriculture and pasturing animals, Luis Maria Cabeza de Baca ("Cabeza de Baca") petitioned the Provincial Deputation of Durango, Mexico, for a grant of unclaimed

public lands known as Las Vegas Grandes located in the Province of New Mexico and the present State of New Mexico in the vicinity of the Town of Las Vegas, New Mexico.

19. On May 29, 1821, The Provincial Deputation of Durango, Mexico, approved the petition of Cabeza de Baca. As approved, the grant contained nearly 500,000 acres of land suitable for growing crops and pasturage.

20. On October 17, 1823, the Governor of the Province of New Mexico issued an order to place Cabeza de Baca in possession of Las Vegas Grandes in accordance with the terms of Cabeza de Baca's petition. After a delay of approximately three years, Cabeza de Baca was, in fact, placed in possession of Las Vegas Grandes by the Province of New Mexico in 1826.

21. Under the laws of Spain, Colonial Spain, and the Republic of Mexico in effect at the time of the grant of Las Vegas Grandes to Cabeza de Baca, the grant vested in Cabeza de Baca, as but one of the many aspects of his property in the grant, perfect ownership of all underground water, tributary or otherwise, associated with Las Vegas Grandes. Based upon said ownership, Cabeza de Baca was entitled, at his discretion, to the absolute and undiminished use and disposition of all underground water which he was able to capture through wells located on Las Vegas Grandes.

22. In 1835, the. Republic of Mexico granted various persons substantially the same lands encompassing Las Vegas Grandes as had been granted to Cabeza de Baca in 1821. This latter grant was for the purpose of settlement and colonization of Las Vegas Grandes.

23. In 1847 and 1848, the United States and Mexico engaged in hostilities known as the Mexican/American War. That war was concluded by the Treaty of Guadalupe Hidalgo of February 2, 1848.

24. Under the Treaty of Guadalupe Hidalgo, that part of the Mexican Province of New Mexico within which the Las Vegas Grandes grant was located was ceded by the Republic of Mexico to the United States of America.

25. By its express terms, the Treaty of Guadalupe Hidalgo, like the law of nations generally, fully and inviolably protected and continues to protect all property rights of every kind belonging to Mexican citizens established within the ceded territories. This protection extended to and included all rights of Cabeza de Baca and his heirs and successors in the Las Vegas Grandes grant and specifically protected, but not by way of limitation, all property in the underground water beneath the Las Vegas Grandes grant.

26. By Act of July 22, 1854, in order to give effect to the Treaty of Guadalupe Hidalgo through the confirmation of *bona fide* grants of Spain and the Republic of Mexico, and for other reasons, the United States Congress established the Office of the United States Surveyor-General in New Mexico, Kansas and Nebraska. The Act assigned to the Surveyor-General the task of ascertaining the origin, nature, character and extent of all claims to lands under the laws, usages and customs of Spain and Mexico and of reporting his findings thereon to Congress for such action as Congress might take.

27. By their application dated June 19, 1855, the heirs of Cabeza de Baca, who was by this time deceased, requested the Surveyor-General to investigate and confirm as valid the Las Vegas Grandes grant to

Cabeza de Baca. The Surveyor-General did, in fact, make such investigation of the Las Vegas Grandes grant, which he designated as Land Claim No. 20, found such to be valid and recommended confirmation of said grant to Congress by his report of December 18, 1858.

28. By Act of June 21, 1860, Congress confirmed the Las Vegas Grandes grant to Cabeza de Baca as Private Land Claim No. 20. One purpose of that Act was to give effect to the requirement of the Treaty of Guadalupe Hidalgo that all property of Mexicans in the territories ceded by Mexico to the United States by the Treaty be inviolably protected.

29. The same general procedure as described above also resulted in Congress' confirmation of the 1835 colonization grant to the Town of Las Vegas.

30. To avoid the conflict anticipated between the heirs of Cabeza de Baca and the successors to the 1835 Grant due to the confirmation of both the 1821 and 1835 grants, Congress authorized, by the Act of June 21, 1860, the heirs of Cabeza de Baca to select no more than five tracts of land, sometimes referred to as replacement floats, within the Territory of New Mexico as it existed on June 21, 1860, in substitution for the 1821 Las Vegas Grandes grant to Cabeza de Baca.

31. On December 12, 1862, the Baca heirs notified the United States that the fourth of the five parcels which they had selected in replacement for the Las Vegas Grandes grant was that parcel of land now generally known as the Baca Grant No. 4 in Saguache County. The selection of this replacement float was finalized on March 18, 1864, when the United States Surveyor-General for the Territories of Colorado and Utah certified the survey of the Baca Grant No. 4. *See* Exhibit D hereto.

32. The Treaty of Guadalupe Hidalgo, the Act of June 21, 1860, and the law of nations protected and continued in force and effect in the Baca Grant No. 4 (and the other four floats) all rights of property vested in Cabeza de Baca, and in his heirs and successors, in Las Vegas Grandes. Specifically, but not by way of limitation, the Treaty, Act, and the law of nations protected and continued in the Baca Grant No. 4, their ownership of and, based upon that ownership, their right, in their discretion, to the absolute and undiminished use and disposition of all underground water, tributary or otherwise, which they might be able to capture through wells located on the Baca Grant No. 4.

33. The applicants are the present owners of the Baca Grant No. 4, and, as such, are the owners of all underground water, tributary or otherwise, beneath the Baca Grant No. 4. Based upon that ownership, applicants are, in their discretion, entitled to the absolute and undiminished use and disposition of any and all underground water, tributary or otherwise, which they may capture through wells located on the Baca Float No. 4. For the purpose of this application, and without prejudice to other uses or applications to use water which they may make in the future, applicants presently claim the right to use and dispose of that underground water claimed in the Baca Wells, as described in ¶ 2.A., above, and as shown in Exhibit A hereto.

WHEREFORE, pursuant to Rule 57, C.R.C.P., and The Uniform Declaratory Judgments Law, §§ 13-51-101, *et seq.*, C.R.S. 1973, applicants respectfully request the judgment, order and decree of this Court that:

A. Based upon the laws of Spain and Mexico as continued in force and effect by the Treaty of

Guadalupe Hidalgo, the Act of June 21, 1860, and the law of nations, the applicants are the fee owners of all underground water, tributary or otherwise, underlying the Baca Grant No. 4.

B. Based upon their fee ownership of all underground water beneath the Baca Grant No. 4, the applicants are entitled, in their discretion, to the absolute and undiminished use and disposition of all underground water, tributary or otherwise, which they may capture through wells located on the Baca Grant No. 4.

C. Based upon their fee ownership, applicants are entitled to the absolute and undiminished use and disposition of such underground water, tributary or otherwise, in the manner and amount claimed in the Baca Wells, as described in ¶ 2.A., above, and as shown in Exhibit A.

D. Applicants may have such other relief as this Court deems proper in this case.

PART III:

DETERMINATION OF RIGHTS TO GROUNDWATER BASED ON GRANT BY UNITED STATES PURSUANT TO THE ACT OF JUNE 21, 1860.

34. The applicants hereby incorporate by this reference, as appropriate, the allegations of paragraphs 1 through 10 and 18 through 33, above.

35. The Act of June 21, 1860, authorized the heirs of Cabeza de Baca to select up to five tracts of land in replacement for the land claimed by them under the 1821 Las Vegas Grandes grant. The Baca heirs, in compliance with the Act, did so and their ownership of the Baca Grant No. 4 was finalized on March 18, 1864.

36. As described by the United States Supreme Court in *Shaw v. Kellogg*, 170 U.S. 312 (1898), the purpose and result of the Act of June 21, 1860, was to finally and unconditionally fix the title to the Baca Grant No. 4 in the heirs of Cabeza de Baca.

37. The Baca Grant No. 4, like the other four floats selected by the Baca heirs, is a legislative grant *de novo* by the Congress of the United States, the body having the authority to make conveyances or other disposals of the property of the United States, to the heirs of Cabeza de Baca of all rights of the United States in the premises encompassing Baca Grant No. 4.

38. Said legislative grant was a grant of absolute right, title, and interest by the United States to the heirs of Cabeza de Baca of the premises comprising the Baca Grant No. 4.

39. Said legislative grant divested the United States of all legal right, title and interest in the premises constituting the Baca Grant No. 4 and segregated the premises from the public domain.

40. The absolute right, title and interest so vested in the heirs of Cabeza de Baca included their unconditional and absolute fee ownership of all underground water underlying the Baca Grant No. 4.

41. The fee ownership of underground water beneath the Baca Grant No. 4 has continued through the years in the successors to the Baca heirs and continues to the present.

42. Applicants are the successors to the heirs of Cabeza de Baca and are the owners of and, based upon that ownership, entitled, in their discretion, to the absolute and undiminished use and disposition of all underground water, tributary or otherwise, which

they may capture through wells located on the Baca Grant No. 4.

43. For the purpose of this application, and without prejudice to such other uses or applications to use water which they may make in the future, the applicants presently claim the right to use and dispose of that underground water claimed in the Baca Wells, as described in ¶ 2.3., above, and as shown in Exhibit A hereto.

WHEREFORE, pursuant to Rule 57, C.R.C.P., and The Uniform Declaratory Judgments Law, §§ 13-51-101, *et seq.*, C.R.S. 1973, the applicants respectfully request the judgment, order, and decree of this Court that:

A. By virtue of absolute grant of the United States under the Act of June 21, 1860, the applicants are the fee owners of all underground water, tributary or otherwise, underlying the Baca Grant No. 4.

B. Based upon their fee ownership of all underground water underlying the Baca Grant No. 4, applicants are entitled, in their discretion, to the absolute and undiminished use and disposition of all underground water, tributary or otherwise, which they may capture through wells located on the Baca Grant No. 4.

C. Based upon their fee ownership of said underground water, the applicants are entitled to the absolute and undiminished use and disposition of such underground water, tributary or otherwise, in the manner and amount claimed in the Baca Wells, as described in ¶ 2.A., above, and as shown in Exhibit A.

D. The applicants may have such other relief as this Court determines proper in this case.

PART IV

DETERMINATION OF RIGHTS TO TRIBUTARY GROUNDWATER ESTABLISHED BY APPROPRIATION PURSUANT TO COLORADO LAW.

44. Applicants hereby incorporate by this reference, as appropriate, the allegations of paragraphs 1 through 10, above.

45. Insofar as the Court may find that the applicants are not entitled to relief as requested in Parts I, II and III, above, the applicants have nevertheless perfected an appropriation of tributary water through the wells described in paragraphs 2 and 3, from the source and depths described in paragraph 4, on the date set forth in paragraph 5, in the amounts claimed in paragraph 6, and for the proposed uses enumerated in paragraph 8, above.

46. With respect to the act of appropriation generally described in paragraph 5, above, said appropriation was made under the following more specific circumstances:

a. In October, 1985, The Baca Corporation, formerly First Delaware-Colorado Corporation, formerly First Colorado Corporation d/b/a First Delaware-Colorado Corporation (hereinafter "FCC") acquired the land, consisting of Baca Grant Ranch as well as certain lands near the town of Villa Grove, all as more fully described in Exhibit C.

b. In April, 1986, FCC's Board of Directors adopted a "Resolution of Intent to Develop, Withdraw, Use and/or Appropriate Water," involving the wells described in paragraphs 2 and 3, above. *See* Exhibit E, page E-1, *et seq.*

c. Commencing on April 21, 1986, FCC caused a detailed field survey to be made of the well locations. *See* Exhibit A.

d. As a part of said survey signs were posted at each well location giving notice of the intent to appropriate water through each of said wells. *See* Exhibit A, plate 2.

e. Newspaper notice of said intent was published first on April 30, 1986, and again in part (to correct typographical errors) on May 23, 1986. *See* Exhibit E, page F-1, *et seq.*

f. On June 6, 1986, FCC conveyed the land to its wholly-owned subsidiary, The Baca Ranch Company (hereinafter "BRC"), together with the appropriation of water described above.

g. On August 15, 1986, BRC and American Water Development, Inc. (hereinafter "AWDI") entered into a "Tributary Water Supply Contract" under which, for valuable consideration: (1) the AWDI contracted to supply water for supplemental, agricultural, industrial and geothermal purposes, and (2) as agent or attorney-in-fact for BRC, AWDI was to file the instant application. *See* Exhibit E.

47. As generally described in paragraphs 6 and 8, above, pursuant to said "Tributary Water Supply Contract," and as more fully. described in Exhibit E, the applicants are to supply BRC with the following annual amounts of water for the indicated purposes:

Amount	Purpose
17,000 a.f.	Supplemental
115,000 a.f.	Agricultural
45,000 a.f.	Industrial
20,000 a.f.	Geothermal

WHEREFORE, AWDI respectfully requests the judgment, order and decree of this Court:

A. Confirming and quantifying applicants' entitlement to such tributary groundwater without requiring a plan for augmentation, and

B. Upon submission of a satisfactory plan for augmentation, if any, necessary to eliminate any injury which may be caused by the exercise of the water rights claimed herein, awarding applicants a conditional water right to withdraw tributary groundwater through said wells pursuant to the provisions of Colorado law, Section 37-92-101, C.R.S., *et seq.*

/s/ Bruce D. Bernard
BRUCE D. BERNARD, #12166
Vice President and
General Counsel
American Water
Development, Inc.
The Baca Ranch Company
The Baca Corporation
Suite 2950
1099 18th Street
Denver, Colorado 80202
303/294-9422

STATE OF COLORADO)
) SS.
COUNTY OF DENVER)

I, Maurice F. Strong, as President of American Water Development, Inc., The Baca Ranch Company and The

Baca Corporation, state under oath that I have read this application and verify its contents.

/s/ Maurice F. Strong
Applicant

Subscribed under oath before me on December 30, 1986.

My commission expires: August 11, 1990

/s/ Judith L. Repp
Notary Public

TABLE OF EXHIBITS

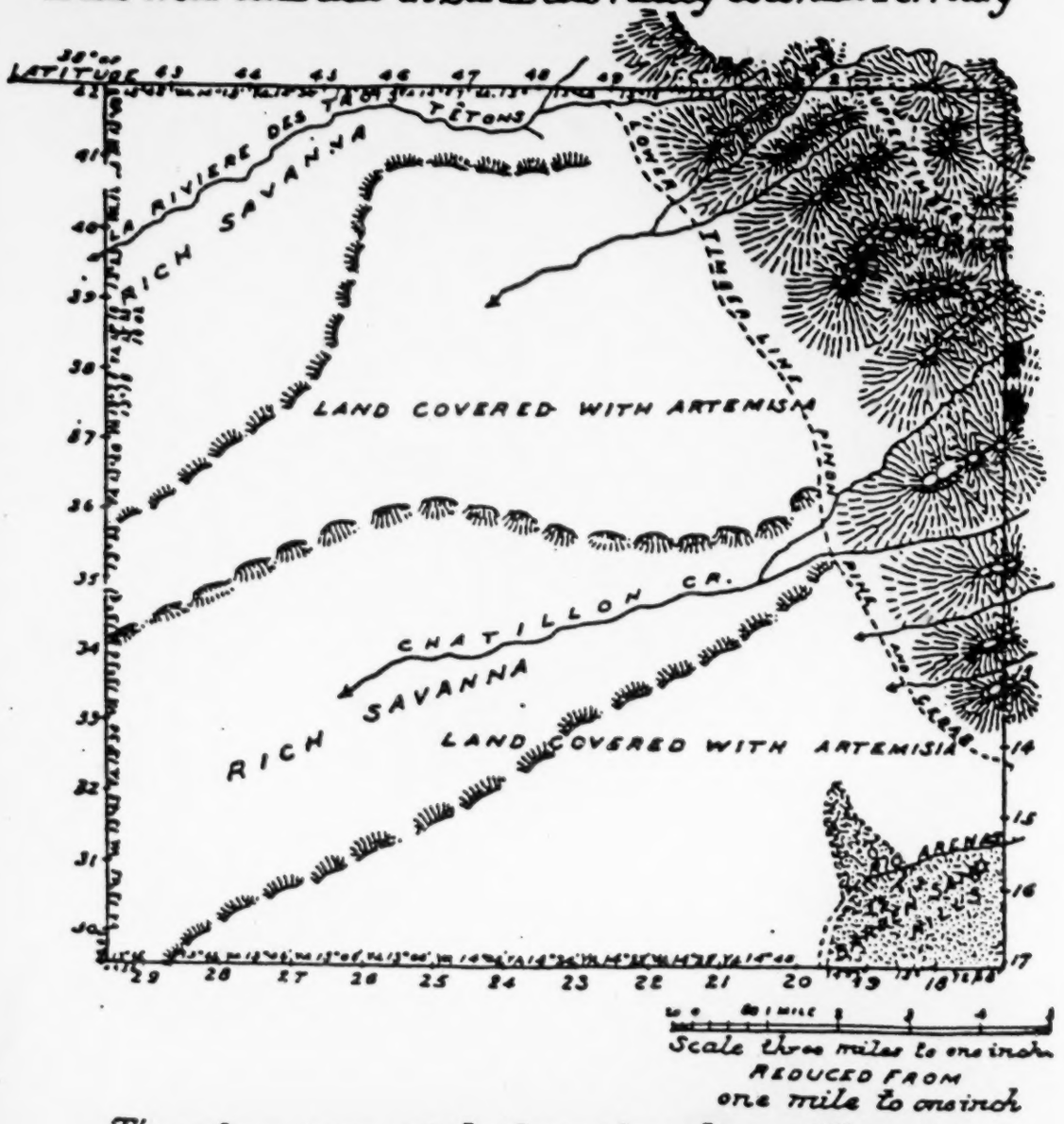
Exhibit	Title
A	"First Colorado Corporation (d/b/a First Delaware-Colorado Corporation) Development Plan for Baca Grant Ranch Water Requirements," May 7, 1986 (seven plates)
B	Legal Description of Lands to be Irrigated
C	Consolidated legal description of the "Lands"
D	Map of the Survey of Grant No. 4
E	"Tributary Water Supply Contract," between Baca Ranch Company and American Water Development, Inc.

[EXHIBITS A-C, E Omitted in Printing]

EXHIBIT D

Map of the Survey of Grant No. 4

MAP OF THE **SURVEY** OF **GRANT** N°4 OF THE HEIRS OF
Luis Maria Baca in San Luis Valley Colorado Territory



The above map of the boundary lines of Grant No. 4 of the heirs of Luis Maria Baca in San Luis Valley Colorado Territory, as surveyed by Albinus Z. Sheldon under his contract bearing date the 7th day of October 1863 is strictly conformable to the field notes on file in this office, which have been examined and approved, subject to the conditions and provisions of Sec. 6 of the act of Congress approved June 21st 1860.

Surveyor Generals Office JOHN PIERCE
Denver March 18th 1864 Sur. Genl. Colo. & Utah

HOUSE OF REPRESENTATIVES.

36TH CONGRESS, *1st Session.*

Ex. DOC. No. 14.

NEW MEXICO – PRIVATE LAND CLAIMS.

LETTER FROM THE SECRETARY OF THE INTERIOR, COMMUNICATING

Documents in relation to private land claims in New Mexico.

FEBRUARY 10, 1860. – Referred to the Committee on Private Land Claims, and ordered to be printed.

DEPARTMENT OF THE INTERIOR,
Washington, February 3, 1860.

SIR: I have the honor herewith to transmit, for the action of Congress under the eighth section of the act approved July 22, 1854, the transcripts of nineteen private land claims in New Mexico, designed for the House of Representatives, as indicated in the letter of the Commissioner of the General Land Office, of the 30th November last, of which a copy is now enclosed.

Similar documents, submitted by the Commissioner in the same letter, for the Senate of the United States, have been this day transmitted to the presiding officer of that body.

Very respectfully, your obedient servant,

J. THOMPSON,
Secretary.

Hon. W. PENNINGTON,
Speaker of the House of Representatives.

GENERAL LAND OFFICE, *November* 30, 1859.

SIR: I have the honor to transmit herewith, in duplicate, the documents in relation to nineteen private land claims, numbers 20 to 38, both inclusive, in New Mexico, with the request that they may be laid before the ensuing Congress for their final action thereon. These claims have been investigated and approved by the surveyor general of New Mexico, with the exception of number 26, which has been rejected by him.

The foregoing documents are put up in two separate packages, marked "U.S. House Reps.," and "U.S. Senate," and each of the nineteen claims is accompanied by a schedule of documents specified in the exhibit "A" herewith.

I have the honor to be, very respectfully, your obedient servant,

S. A. SMITH,
Commissioner.

Hon. J. THOMPSON,
Secretary of the Interior.

CLAIM NO. 20.

TOWN OF LAS VEGAS. – THOMAS BACA *et al.*

NOTICE.

TERRITORY OF NEW MEXICO,)
County of Santa Fé)

To the Hon. William Pelham, surveyor general of the Territory of New Mexico, under the act of Congress approved July 22, A. D. 1854:

Your petitioners, the surviving heirs-at-law of one Luis Cabeza de Baca, deceased, would respectfully state that, on the 16th day of January, 1821, the provincial deputation of the State of Durango granted to the ancestor of your petitioners, Luis Cabeza de Baca, a tract of land called the "Las Vegas Grandes," and which said grant was afterwards ratified by the provincial deputation of New Mexico, and which said grant has for its boundaries the following landmarks, to wit: On the north the Chapellote river; on the south the boundary of San Miguel del Bado; on the east the Aguage de la Llegua and the boundary of Antonio Ortiz, and on the west the summit of the Pecos mountains, all of which will more fully appear by reference to the said grant, now on file in the office of the surveyor general, No. 137, and the grant to Antonio Ortiz, No. 727, and the grant to San Miguel del Bado, No. 125, to all of which reference is hereby made. Your petitioners further state that said lands, marks, and boundaries are well known and easily discovered, but inasmuch as no survey of said lands has as yet ever been made, the quantity of land included within said boundaries is unknown to your petitioners. Your petitioners further state that it will appear by reference to

said grant that it was made to the said Luis Cabeza de Baca and his male children, and invested him and his male children with an absolute title to said lands.

Your petitioners further state that the said Luis Cabeza de Baca and his male children took possession of said lands under said grant, built a ranch upon said lands, and with their servants and stock, consisting of about six hundred mules and horses, continued to use, occupy, and possess the lands aforesaid, and after several years' peaceable and quiet occupancy of said lands they were driven away from them by the hostilities of the Indians, and the said six hundred mules and horses, of the value of thirty-six thousand dollars, were taken away by the said hostile Indians. Your petitioners further state that hostilities continued to exist upon the part of the Indians, so that said lands could not be occupied by them until about the year 1835, at which time a grant was made by the provincial deputation of New Mexico to Juan de Dios Maese, Miguel Archuleta, Manuel Duran, and twenty-five others, extending to any others desiring to settle within the grant to the lands of your petitioners, as will more fully appear by reference to said grant, now on file in the office of the surveyor general, and No. 12 on the docket book. Your petitioners further state that at the time said grant was made by the provincial deputation of New Mexico to the said Juan de Dios Maese and others, the said deputation, and said, Juan de Dios and other grantees, well knew that said lands of right belonged to and were the lands of your petitioners under the previous grant of the State of Durango, confirmed and ratified by the provincial deputation of New Mexico, by means whereof the said grant is fraudulent and void, and the

said Juan de Dios Maese and others acquired no title to said lands under said grant, and the said lands still rightfully belong to your petitioners.

Your petitioners further state that said lands are situated in the county of San Miguel, in the Territory of New Mexico. Your petitioners further state that said Luis Cabeza de Baca has long since departed this life, and the only male children and the said Luis Cabeza de Baca, now living, are the following, to wit: Luis Baca, Prudencio Baca, Jesus Baca the 1st, Felipe Baca, Jesus Baca the 2d, Domingo Baca, and Manuel Baca. Your petitioners further state that the following sons of Luis Cabeza de Baca are dead, to wit: Juan Antonio Baca, José Baca, José Miguel Baca, Ramon Baca, and Matio Baca; and, at the time of their decease, they left the following children and heirs-at-law then surviving, to wit: Juan Antonio Baca left him surviving the following children: Jesus Maria Baca, Francisco Tomas Baca, Incarnacion Baca, José Baca, Josefa Baca, Guadalupe Baca, Altagracia Baca, Nicolas Baca, Tomas Baca, Trinidad Baca. José Baca left him surviving the following children: Antonio Baca, Felipe Baca, José Maria Baca, Francisco Baca, Fernando Baca, and Polonio Baca. José Miguel Baca left him surviving the following children, to wit: Diego Baca, Quirina Baca, Romaldo Baca, Guadalupe Baca, Paulina Baca, and Martina Baca. Ramon Baca left him surviving the following child, to wit: Ygnacio Baca. Mateo Baca left him surviving the following children, to wit: Luis Baca, Alejandro Baca, Juan de Dios Baca, and Martin Baca. Your petitioners further state that the foregoing list contains all the surviving heirs of the said Luis Cabeza de Baca, deceased, known to your petitioners, and they are all residents of the Territory of

New Mexico. Your petitioners further state that the infancy of many of said heirs, the internal revolutions of the republic of Mexico, the war with the United States, and the acquisition of this Territory by the United States, have hitherto prevented them from regaining possession of said lands thus wrongfully taken from them. Your petitioners therefore ask that their title be investigated, and that such steps be taken in the premises as will secure to them the benefits of said grant, and a legal title to the same under the said act of Congress of July 22, 1854. All of which is respectfully submitted.

JOHN S. WATTS,
Attorney for Petitioners.

SURVEYOR GENERAL'S OFFICE,
Santa Fé, New Mexico, August 31, 1859.

The above is a true copy of the original on file in this office.

WM. PELHEM,
Surveyor General.

GRANT – TRANSLATION.

SECRETARY'S OFFICE OF THE MOST EXCELLENT TERRITORIAL DEPUTATION OF NEW MEXICO

I, the undersigned, secretary of the most excellent territorial deputation of Santa Fé, New Mexico, certify that in the book in which are recorded the proceedings of said must excellent deputation, on the fortieth page of

said book, is to be found the action taken on a petition presented by Don Juan Antonio Cabeza de Baca, in the following words literally taken therefrom, viz:

MOST EXCELLENT SIR: The citizen Juan Antonio Cabeza de Baca, in the name of his father, Don Luis Maria, in the best form and most approved manner represents to your excellency that on the 16th day of January, 1821, my said father presented to the most excellent provincial deputation of Durango the petition herewith presented, and it was therefore ordered by the body that the communication addressed by the present political chief to the justice of the peace of El Bado, which is herewith presented, be concurred in.

These legal steps, together with those taken by the political chief in his communication addressed to the justice of El Bado, have caused my father to believe that the lands commonly called Las Vegas Grandes are his property, and consequently should not be granted away, at the same time calling your excellency's attention to the fact that said lands have been occupied with our stock, and my father has consequently been considered its proper owner; further, if the fact of my father not being able to produce the documents or possession, will be any cause for not recognizing said land as his, I pray your excellency to take into consideration that my father is not to be blamed in this matter, as he has never ceased to present his claim; on the contrary, it should be preferred to all others, not only on account of the length of time which he has held it, but also for having taken the steps necessary to complete his perfect title thereto. Therefore I pray your excellency to cause the proper title deed to the

issue in favor of my aforesaid father, with all the necessary requisites, being in justice due to him.

SANTA FÉ, *February* 16, 1825.

JUAN ANTONIO CABEZA DE BACA.

Don Luis Maria Cabeza de Baca, resident of the province of New Mexico, for himself and in the name of seventeen male children, appears before the supreme tribunal of the deputation of the province of New Mexico, to whom corresponds the distribution and marking out of the unclaimed public lands, and states that a certain tract of land suitable for cultivation and pasturage, called the Vegas Grandes, on the Gallinas river, in the jurisdiction of El Bado, being in the above condition, and not having sufficient room, and being very much confined, I suffer a great many injuries: therefore I pray that the aforesaid tract of land be granted to me for the purposes above mentioned, in order that I may with convenience cultivate the soil and advance the interests of agriculture, pasture the animals Providence has been pleased to favor me with, and live in the quietude and repose I aspire to.

This same petition was presented to the government of this province, and in a decree of the 18th of February last the grant was made to me in company with eight citizens of El Bado. These persons having other grants take no interest in this grant. I therefore, with my said children, renew my application under the protection of the wise and beneficent laws of the sovereign cortes. I therefore pray the supreme tribunal, to whose jurisdiction belongs the conferring of this grant, to donate it to me, with the following boundaries, which are: on the

north the Chapellote river; on the south the boundary of El Bado; on the west the summit of the Pecos mountain; on the east the Aguage de la Llegua and the boundary of Don Antonio Cortiz – a benefaction which I expect from the liberality of the aforesaid supreme tribunal.

NEW MEXICO, *January* 16, 1821.

LUIS MARIA CABEZA DE BACA.
[Rubric.]

In view of the petition presented by Don Luis Maria Cabeza de Baca to the most excellent provincial deputation of Durango on the 16th day of January, 1821 this province being subordinate to that corporation, and the report made by his excellency the governor Colonel Facundo Melgares, touching the contents of said petition, therefore they saw proper to issue an order which is literally as follows: Supposing that the partners of Don Luis Maria Cabeza de Baca have other lands where they can pasture their stock, this deputation has determined to grant unto the second the land commonly called the Vegas Grandes, provided the others have erected no buildings on said lands or incurred other expenses, unless they shall agree that the amounts disbursed be refunded to them by the aforesaid Baca, assigning to them a portion equal to that held by them in the Vegas Grandes, in the place to be designated by themselves, of which you are hereby informed, so that you may cause the same to be complied with and the parties interested be informed thereof. God preserve you many years. Durango, May 29, 1821. Signed, Diego Garcia Conde. Signed, Miguel de Zubirria. To his excellency the governor of New Mexico. And I enclose the same to you in

order that, in compliance with what has been ordered, you proceed to place the aforesaid Luis Maria Cabeza de Baca in possession, according to the terms set forth in his petition, which is herewith enclosed, the eight citizens included in his first petition having placed no improvements on the aforesaid land, placing immediately after his petition the proceedings had by you in the premises, which will be returned to these archives, from whence a certified copy will be given to the party interested. God preserve you many years. Santa Fé, October 17, 1823.

BARTOLOME BACA.

Don MANUEL ANTONIO BACA, *Justice of El Bado.*

Public session of the 16th day of February, 1825, book second of the proceedings of said body, page 40, section 3.

A petition from Don Juan Antonio Cabeza de Baca was read, referring to the grant of land made to him in one thousand eight hundred and twenty-one by the most excellent provincial deputation of Durango, to which corporation New Mexico was subject at that period. It was resolved that the proper writ be issued, giving a copy thereof to the party interested, and confirming the grant made by said corporation on the date aforesaid; which documents will be presented, as required, to the territorial justice of El Bado, who, having then there the grant made to Don Salvador Montoya, will place the aforesaid Don Luis Maria Cabeza do Baca and male children in possession of the aforesaid land according to the action had in the premises, and which has been granted to the party without injury to any third party.

ANTONIO ORTIZ, *President.*
PEDRO GARCIA.
JOSE FRANCISCO BACA.
PEDRO BAUTISTA PINO.
MARTIAS ORTIZ.

JUAN BAUTISTA VIGIL, *Secretary.*

SANTA FÉ, *February* 27, 1825.

A correct copy of the original deposition in the archives of this most excellent deputation of New Mexico, under my charge.

JUAN BAUTISTA VIGIL, *Secretary.*

Fees for the present copy, twenty hard dollars.

VIGIL.

SAN MIGUEL DE BADO, *December* 26, 1825.

Although Don Miguel Baca and Don Mateo Baca appeared before me on the 20th, in the afternoon, asking the restoration of the land granted to Don Luis Maria Cabeza de Baca and children by the most excellent deputation, and not being able to do so on account of having promulgated an order to the citizens of my jurisdiction to commence on the 21st an election for my successor and members of the corporation, and having been so much indisposed on the second day of the election that I suspended said election until the 3d, and which I terminated on the 5th, my disease having reached its crisis, and was obliged to confess, as will be proven by the messengers of Don Luis Maria Cabeza de Baca, and these have been the reasons for not having complied with the order.

THOMAS SENA, *Constitutional Justice.*

SANTA FÉ, *January* 13, 1826.

Let it proceed to the constitutional justice of El Bado, to give the possession granted.

NARBONA.

To his excellency the Commanding General and Governor of this Territory:

The citizen Luis Maria Cabeza de Baca with the greatest submission and respect appears before you and states: That having applied several times to justices of El Bado to place me in possession of the tract commonly called Las Vegas Grandes, granted to me by the provincial deputation of Durango in the year 1821, and confirmed by the most excellent deputation of this Territory, as will appear by the documents accompanying this my petition, and contained in five written pages, and the statement of the justice Don Thomas Sena, which will give you the information you may require in your decision, I therefore pray your excellency that, if I have any right, you will be pleased to direct the justice of the precinct of El Bado to fulfil what has been referred.

LUIS MARIA CABEZA DE BACA, *persecuted.*

SANTA FÉ, *January* 13, 1826.

SURVEYOR GENERAL'S OFFICE,
TRANSLATOR'S DEPARTMENT,
Santa Fé, New Mexico, July 31, 1859.

The foregoing is a correct translation from the original Spanish on file in this office.

DAVID V. WHITING, *Translator.*

SURVEYOR GENERAL'S OFFICE,
Santa Fé, New Mexico, September 17, 1859.

The foregoing is a true copy from the original now on file in this office.

WM. PELHAM, *Surveyor General.*

NOTICE.

UNITED STATES OF AMERICA,)
Territory of New Mexico.)

To the Hon. William Pelham, Surveyor General of the Territory of New Mexico:

Francisco Lopez and Henry Connelly and Hilario Gonzales, on behalf of themselves and a large number of citizens of the United States, residents of the town of Las Vegas and its vicinity, in the county of San Miguel, Territory of New Mexico, represent to your honor that they and the citizens they represent are the claimants and legal owners of a certain tract of land lying and being situate in the county of San Miguel, in the Territory of New Mexico, which said land was granted by the provincial deputation of said Territory in the year A. D. 1835, to Juan de Dios

Maese, Miguel Archuleta, Manuel Duran, and José Antonio Casados, in their own behalf and that of twenty-five other inhabitants of said county, which said grant is now filed with this petition, (with leave to refer thereto as often as may be necessary,) and the boundaries of said grant are as follows, to wit: Bounded on the north by the Sapello river, on the south by the boundary grant of Don Antonio Ortiz, on the east the Aguage de la Llegua, and on the west the grant of San Miguel del Bado; and the said claimants claim under and by virtue of settlements made under said original grant, and in conformity with the terms of said grant. Your petitioners refer to the laws, usages and customs of Mexico in force at the time of the making of said grant, to the Spanish laws and regulations which were declared and recognized by the government of Mexico to be in force and effect. For which power and authority, see Collection of the Decrees and Orders of the Cortes of Spain, published by Mariano Galvan in 1829, page 56, and from page 91 to 101; see also Decrees of Mexico of June 4 and September 18, 1823, pages 123 and 180, 2 vol. Collection of Decrees; see, also, Ordenanzas de Tierras y Aguas, page 8; Peters' Reports, 436; I Howard, 24; 15th Peters, 130; 6th Peters, 621; Holcomb's U.S. Digest, pages 358 to 363.

The said claimants cannot show the quantity of land embraced in said grant, except as the same are set forth in the boundaries of said grant, nor can they furnish a plat of survey of said grant, as no survey of the land has ever been executed.

Your petitioners, the claimants, are also informed and believe that Thomas Cabeza de Baca, for himself and

others, are claimants, also, for the lands embraced in said grant and now claimed by your petitioners. Your petitioners pray that their claim and title to said lands be examined as required by law, and that said grant be confirmed to them; and, as in duty bound, will ever pray, &c.

SMITH, HOUGHTON &
ASHURST,
For Petitioners.

SURVEYOR GENERAL'S OFFICE,
Santa Fé, New Mexico, August 20, 1859.

The above is a true copy of the original on file in this office.

WM. PELHAM,
Surveyor General.

GRANT – TRANSLATION.

Seal Third. [SEAL.] Two Rials.

For the years one thousand eight hundred and twenty-six and eight hundred and twenty-seven.

MOST RESPECTFUL CORPORATION: The citizens Juan de Dios Maese, Miguel Archuleta, Manuel Duran, and Jose Antonio Casaos, for themselves and in the name of twenty-five men, appear before your honorable body in the best and most approved manner, and according to law, and state that having registered a vacant and uncultivated piece of land, commonly known by the name of Las Vegas, on the Gallinas river, about five leagues distant

from this settlement, which land we solicit for the purpose of planting a moderate crop, to have also the necessary land for pasture and watering places, and having the following boundaries: on the north the Sapello river, on the south the boundary of the grant made to Don Antonio Ortiz, on the east the Aguage de la Zegua, and on the west the boundary of the grant to San Miguel del Bado, which grant we pray for without injury to any third party, binding ourselves to receive possession in the name of the federation, and to comply with the reasonable and equitable conditions which your excellency, by virtue of the authority conferred upon you, may be pleased to establish for the grant of the land, being pleased to lay this our petition before the most excellent territorial deputation, having first obtained the customary report which by law is intrusted to your excellency, in order that that most excellent body may order the aforesaid grant to be made to us, in which the advancement of agriculture and the well being of several families without occupation are interested. Therefore, we request and pray your excellency that considering us as having presented ourselves, to yield to our petition, which we swear not to be done in malice; and in whatever may be necessary, &c.

JUAN DE DIOS MAESE. (Rubric.)
MANUEL DURAN. (Rubric.)
MIGUEL ARCHULETA. (Rubric.)
JOSÉ ANTONIO CASAOS. (Rubric.)

SAN MIGUEL DEL BADO, *March* 20, 1835.

SANTA FÉ, *March* 24, 1835.

On this date the justice of El Bado is notified to proceed according to the directions of the most excellent deputation and this government.

SARRACINO. (Rubric.)

SAN MIGUEL DEL BADO,
In the Town House, on the 20th day of March, 1835.

The foregoing petition, signed by the subscribers thereto, is received. This corporation, desirous of encouraging the advancement of agriculture, and the location of so many families without occupation, and being true that the land solicited as above is public land, and without injury to any third party nor of (torn) * * * let this petition proceed to the most excellent territorial deputation, in order that its excellency, if it sees proper, may provide them with the land prayed for, the entailment of which is earnestly aspired to.

JOSÉ ULIBARRI, *President.* (Rubric.)
FRANCISCO SENA,
First Justice. (Rubric.)
LEONIOS LUCERO,
Fourth Justice. (Rubric.)
GERONIMO GONZALES,
Second Justice. (Rubric.)
THOMAS ARAGON,
Attorney. (Rubric.)
JOSÉ CANDELARIA FLORES,
Third Justice. (Rubric.)

Before me,

JOSÉ ANTONIO CASAOS,
Secretary of Corporation. (Rubric.)

(Book 1st, page 6.)

OFFICE OF THE MOST EXCELLENT DEPUTATION OF NEW MEXICO,
Santa Fé, March 23, 1835.

In consultation of to-day, its excellency has resolved as follows:

The land contained within the boundaries expressed in this petition is granted not only to the petitioners and the residents of El Bado, but also generally to all who may be destitute of lands to cultivate, provided "that the grant to these lands is made on condition that the pasture and watering places are free to all. In view of all which, the political chief will receive the petition which may be made, and shall cause them to be provided for agreeably to what has been ordered."

In compliance with instructions, let these original proceedings be forwarded to the political chief, who will be pleased to execute what is therein ordered by this deputation, by whose order the foregoing is done.

R. ABREU, *Secretary.* (Rubric.)

In reference to a petition made by the President's (torn) * * * Juan de Dios Maese, Miguel Archuleta, Manuel Duran, and José Antonio Casaos, for themselves and in the name of twenty-five other individuals, dated the 20th inst., in which they solicited land in Las Vegas, its excellency the provincial deputation has resolved the following in reference to the matter:

(Book 1st, page 6.)

OFFICE OF THE SECRETARY OF THE MOST EXCELLENT
DEPUTATION OF NEW MEXICO,
Santa Fé, March 23, 1835.

In consultation of to-day its excellency has resolved as follows:

The land contained within the boundaries expressed in this petition is granted not only to the petitioners and the residents of El Bado, but also generally to all who may be destitute of lands to cultivate, provided "that the grant to these lands is made on condition that the pasture and watering places are free to all. In view of all which, the political chief will receive the petitions which may be made, and shall cause them to be provided for, agreeably to what has been ordered."

In compliance with instructions, let these original proceedings be forwarded to the political chief, who will be pleased to execute what is therein ordered by this deputation, by whose order the foregoing is done.

R. ABREU, *Secretary.* (Rubric.)

And I communicate it to you for the entire compliance therewith, taking into consideration that the grants are to be made according to the means of each one of the petitioners, in order that they may not leave any land which may be given to them without cultivation. It is also convenient to suggest that you should select a site for a town to be built by the inhabitants, together with such other steps as you may deem proper for the security of the inhabitants, who, on account of settling on the land indicated, will be included in your jurisdiction; you will therefore adopt such measures as will be most conformable to the laws.

You will retain the petition relative to the matter, and return (torn) as this should be (torn) of the proceedings

had by you; of all which you will inform this government so soon as it is in condition to do so.

God and Liberty.

F. SARRACHINO. (Rubric.)

SANTA FÉ, *March* 24, 1835.

To the Constitutional Justice of El Bado:

At this time there is no paper with the third seal in this office.

SARRACINO.

At Nuestra Señora de Ios Dolores de Las Vegas, on the sixth day of the month of April, in the year one thousand eight hundred and thirty-five, jurisdiction of San Miguel del Bado, I, the citizen José de Jesus Ulibarri y Duran, constitutional justice, the only one in this jurisdiction, proceeded to this town for the purpose of distributing the lands to twenty-five individuals, mentioned in the petition dated March 28, 1835, and in general to those who are without lands, not only those within this jurisdiction, but also any one who may present himself to me who has no occupation; and having examined the land, I took the measures from north to south, after which I made the distribution according to that portion of the colonization law which refers to grants of the public lands, complying with the greatest care with the directions of the most excellent territorial deputation of New Mexico, contained in its decree of the 23d of March, 1835, and the decree of his excellency the political chief, citizen Francisco Sarracino, dated the 24th of the same month; each individual received a gratuitous piece of land according to his means, with the understanding that of

the lands given to the persons contained in the accompanying list none should remain uncultivated. The whole matter was concluded with the best measures which myself and the parties interested considered the most convenient, in order that each party should be satisfied with his share, setting opposite to each one's name the number of varas he received. The aforementioned list also contains the number of individuals who resided in the new settlement, and, after having made the distribution, I proceeded to make known to them the petition found at the commencement of this document, assigning them the same boundaries as are set forth in the petition. I also informed them that the water and pasture were free to all, and that the joint labor should be done by themselves without any dispute, and that the wall surrounding the town marked out should be made by them all, which being done, that they notify the justice, in order that he may mark out to each one equally the portion he is entitled to. Also, that each one be well provided with arms, the care of which is intrusted to the lieutenant of police of that ward, who shall inspect the arms every eight days, and, should he observe any infraction, to inform this court, as the head of the ward, thereof, so as to provide the necessary measures. They were also informed that no one should sell his lands until he acquired the title prescribed by law to all colonists, and, in order that it may so appear at the present time and in the future, placed the originals in the archives under my charge, signing the same with three attending witnesses, in the absence of (torn), there being none in the terms (torn) law, to which I certify.

JOSÉ JESUS ULIBARRI. (Rubric.)

Attending,

José Miguel Sanchez (Rubric.)

Attending,

Antonio Nieto. (Rubric.)

Attending,

Manuel Duran. (Rubric.)

Decree. – The originals annexed to these proceedings, containing eight written pages, are deposited in the archives under my charge. I have so provided, ordered, and signed on said day, month, and year, and I sign with those in my attendance, to which I certify.

JOSE DE JESUS ULIBARRI, (Rubric.)

Attending,

Manuel Duran. (Rubric.)

Attending,

Antonio Nieto. (Rubric.

List showing the number of individuals who occupy the new settlement entitled "Nuestra Señora de los Dolores de Las Vegas," and showing the number of yards of land each one has received; which is as follows, to wit:

Citizen Acensio Baca 175
Citizen Simon Blea 100
Citizen José de Jesus Ulibarri 150
Citizen Santiago Ortega, selected in Balendre, 150 yards of land, ... 150
Citizen Juan de Dios Maese 250
Citizen Juan José Baca 200
Citizen Francisco Lopez 100
Citizen Tomas Baca 225

For gardens, 125 varas towards the north, and 25 for a road to the watering place, one each side, and towards

the south 750 varas for gardens, from whence the distribution continues, to the individuals contained in the list, noting that the number of yards herein stipulated for gardens and roads is opposite to the square plaza which I marked out on either side. I left this number of yards for the inhabitants of the place, to be divided equally between them:

Citizen José Gaudalupe Baca 150
Citizen Miguel Rendon 150
Citizen Rafael Rendon 100
Citizen Cruz Rendon 150
Citizen José Lucero 200
Citizen Foribio Crespin 100
Citizen Pablo Ulibarri 150
Citizen Antonio Ulibarri 185
Citizen Juan Pedro Archuleta 150
Citizen Eulogia Segma 100
Citizen Ramon Ulibarri 100
Citizen Teodocio Quintana 200
Citizen Felipe Tafallo 250
Citizen José de Jesus Duran 100
Citizen Manuel Duran 175
Citizen Antonio Romo 200
Citizen Simon Romo 100
Citizen José Maria Martin 200
Citizen Miguel Martin 200
Citizen Antonio Martin 200
Citizen Juan Nepomuceno Martin 100
Citizen Miguel Martin, jr. 100
Citizen Juan José Martin 100

NOTE. – That from José de Jesus Duran to the end of the above list the land is situated in a valley on the opposite side of the river, towards the east, also the number of varas set apart for gardens and road to watering place, lie between José Maria Martin and Miguel

Martin, sr., on the side above mentioned; and, in order that it may so appear, I have signed this 6th day of April, 1835, attaching to this list of distribution the names of such individuals as may apply for lands after this date.

JOSÉ ULIBARRI.

Citizen Victorine Baca 150
Citizen Hilario Gonzalez 455
Citizen Antonio Gallego 200
Citizen José Antonio Ulibarri, sr., (José Miguel Garcia took the place of Jose Antonio Ulibarri, sr., and entered upon his lands) 125
Citizen Rufino Gonzalez 100
Citizen Ambrocio Gonzalez 100
Citizen Santos Gonzalez 100
Citizen Francisco Sanchez 355
Citizen Rafael Rodriguez 166
Citizen Julian Ulibarri 225
Citizen Manuel Tafolla received a portion in the valley.
Citizen Mariano Gonzalez received a portion in another valley.
Citizen Mariano Gonzalez, sr. 150
Citizen Manuel Garcia 250
Citizen Desiderio Maese 100
Citizen Rafael Duran 200
Citizen Vicente Romero 200
Citizen Santiago Ulibarri 600
Citizen José Leon Romero 200
Citizen José Antonio Flores 200
Citizen Rafael Duran 200
Citizen Rafael Romero 200
Citizen Miguel Romero 200
Citizen Juan Christobal Armijo 220

Citizen José Miguel Sanchez 200
Citizen Francisco Maese 111
Citizen Francisco Lucero 113
Citizen Miguel Caerio 150
Citizen Rafael Cestillo 100
Citizen José Fernando Gallego 100
Citizen José Dolores Sena 185
Citizen José Ramon Sena 125
Citizen Francisco Sena 200
Citizen Vicente Villanueva 100
Citizen José Pablo Baca 100
Citizen Ramon Baca 100
Citizen Feribio Archuleta 100
Citizen Fernando Chaves, (Ramon Pena took his land, the other having left) 100
Citizen Foribio Martin 100
Citizen Miguel Montañio 100
Citizen Jesus Pando 100
Citizen Juan Felipe Sanchez 100
Citizen Maria Encarnacion Armijo 100
Citizen José Flores 75
Citizen Cruz Martin, on the opposite side of the river and two little valleys 100
Citizen Polonio Herrera 100
Citizen Ferrer Herrera 50
Citizen Fabìan Archuleta 100
Citizen Simon Romo 100
Citizen Ramon Vigil 100
Citizen The remainder was given to Juan José Vigil 170
Citizen Anastacio Roibal 175
Citizen Francisco Sanchez, also a little valley 150
Citizen Pedro Barela 100

Citizen Julian Jimenez 100
Citizen Ramon Benavides 100
Citizen Antonio Garcia 100
Citizen Rafael Rodriguez 100
Citizen Pedro Gonzalez 200
Citizen Andres Truqueque 100
Citizen Gabriel Crispin 100
Citizen Ascensio Baca 100
Citizen Miguel Archuleta 1,067
Citizen José Maria Tafoya 700
Citizen José Miguel Carrello 100
Citizen Christobal Baca 500
Citizen Miguel Martin 125
Citizen Martin Romero, 50 more 100
Citizen Domingo Gama, 50 more 100
Citizen Santiago Sandoval 50

Names of those in the cañada of Pecos from the road dividing lodemora to the arroyo of Pecos:

Citizen Jesus Maria Montoya ..... varas 200
Citizen Santigao Montoya 100
Citizen Antonio José Suiz 100
Citizen Asensio Sanez 100
Citizen Tomas Ulibarri 100
Citizen Rafael Rodriguez, (Antonio Saenz takes the place of Rodriguez by purchase) 100
Citizen Domingo Peña 200
Citizen Nerio Montoya, (Anastacia Gonzalez takes his place) 150
Citizen Luis Maria Gonzalez 170
Citizen Patricio Benavides, (Guillermo and Valeriano take his place, with 75 varas each in the valley above the ravine on the river) 150
Citizen Christobal Baca 250
Citizen Pablo Pando 100

Citizen Jesus Pando 100
Citizen Pedro Garcia 100
Citizen Acensio Garcia 100
Citizen Esquipula Baca 100
Citizen Julian Archuleta 100
Citizen Sebastian Duran 200
Citizen Salvador Martin 200
Citizen Rafael Niaso 200
Citizen Andres Fruqueque 100

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Citizen Francisco Lucero 340
Citizen José Flores 100
Citizen Francisco Sanchez 400

Leaving 50 varas for a public road on the bank below where the plaza is situated, where 50 varas are to be left. Pedro Barela, two little valleys at the springs.

Names of citizens placed in possession of lands at the Puerticito, which is attached to the general list of distribution; that is, the the lower Puerticito:

Citizen Ramon Cisneros, no varas designated.
Citizen José Pablo Maese, no varas designated.
Citizen Juan Sais ..... varas 350
Citizen Antonio Sais ..... varas 250
Citizen Felipe Tafoya 125
Citizen José Dolores Duran 100
Citizen José Duran 126
Citizen Rafael Cistillo 100
Citizen Rafael Garcia 125
Citizen Francisco Antonio Sanchez, (Upper Puerticito) 150
Citizen Juan Martin, for himself and father, from the boundary of Mariano Gonzales to the road.
Citizen Mariano Gonzales, jr. 100
Citizen Don Lorenzo Baca 100

Citizen Ana Maria Chama 100
Citizen Augustin Quintana 100
(And a small valley in the river, not measured.)
Citizen Juan José Martin, from the boundary of Augustin to the road.
Citizen Juan Gallego, at the mouth of the cañon of the Aqua Sarca, on one side of the arroyo, from a rock in the middle of the valley to the lower rock.
Citizen Sebastian Duran 100
Citizen Jesus Duran 100

One hundred varas of land were given to Gregoria Vigil of the remaining lands of the Aqua Sarca, designating as boundaries, on the west the little cañon of the Aqua Sarca; on the east the arroyo Abayo; on the north a hill near the creston, and on the south the common boundary, respecting the tracts already donated.

At the request of several citizens asking for lands, composing the drippings of the plaza, for gardens, I have given to each one twenty-five varas in length, with the precise condition that they should fence them in; and in case of not doing so, they cannot claim damages. The individuals are as follows:

Francisco Sanchez 25
Antonio Saenz 25
Simona Gallegos 25

In this respect the quantity of land which I have distributed, and which is watered by the ditch (Acequia) which was constructed across the square for the purpose of finishing the temple, is the remainder of the plain from the little hills, amounting to twenty varas, before descending to the meadow, which is divided by certain

mounds of stone on the northern side before descending to the plain where the public road is to run.

VEGAS, *June* 11, 1841.

Distribu'ion.

Felipe Tafoya	150
Francisco Antonio Sanchez	100
Miguel Tafoya	100
Prudencio Griego	150
José Zamora	100

Land distributed on the new ditch (acequia) which was opened for the construction of the upper town:

Juan Manuel Martin	varas 150
José Manuel Angel	100
Pedro Bastos	200
Jesus Castillo	100
José Flores	100
Manuel Archuleta	100
Crisantos Salas	100
Felipe Martin	100
Antonio José Sais	50

At the springs, the foreigners William and Anthony Donaldson; José Manuel Angel, a little corner in the cerrito, not measured; Don Ramon Vigil, a valley on the other side of the arroyo of the Pecos, from the wagon road to the blue hills, not measured.

In the two of Las Vegas, on the 25th day of November, 1846, at the request and by the official grant of land for cultivation made by the senior justice to the citizens contained in the present list, I proceeded with my attending witnesses to distribute said lands, and taking the

measurement on the northern side, the individuals soliciting the same were located in the following manner:

	Varas.
Miguel Antonio Fadrique	200
Gertrudis Salazar	200
Juan Jarmillo	200
Martin Romero	200
José Maria Garcia	200
Vicente Segma	200
Juan José Montoya	200
Jesus Maria Maese	200
Rafael Duran	200
Miguel Martin, jr.	200

Anisteo Quintana, from the boundary of Miguel Martin to the road, without measurement.

The persons whose names appear on the foregoing list received the number of varas set opposite their names, it being understood that the water shall run on the bed of the river in case of a scarcity, (not legible) by appointment, and to which shall be attached the original communication granting the land; the present document to be attached to the general grant made to Las Vegas, in order that it may so appear, and for security in all time to come. To which I certify.

JUAN DE DIOS MAESE. [Rubric.]

Attending,

ANTONIO SAENZ. [Rubric.]

Attending,

FRANCISCO BUSTAMENTE. [Rubric.]

OFFICE OF THE SEÑOR JUSTICE OF THE DISTRICT OF THE CENTRE.

Informed of the contents of your note of to-day, touching petitions for lands made by certain individuals of that place. In reply, I have to state that you are authorized to place them in possession of said land on the conditions referred to yesterday.

In reference to what you requested me to investigate, touching the evidence given by the police officer, I reply that it is true; therefore you are requested to remove him from office, and appoint Francisco Martin, relieving him and exonerating him from all duty.

God and liberty.

TRINIDAD BARCELO.

VALLEYS OF SAN AUGUSTIN, *November* 20, 1846.

To the Justice of the Peace, Don Juan de Dios Maese:

Las Vegas, on the 17th day, (torn,) at the request of seven individuals who have registered a tract of public land, although the aforesaid land was given over three years since to another individual, who has not placed his hand on it; and seeing the neglect and little interest taken by the former possessor of the land, I, the citizen Hilario Gonzalez, accompanied by the petitioners, having examined the land, and considered their petition just, both being laborers and industrious in matters of agriculture, I saw proper to place them in possession of the number of varas of land which each one can cultivate; with the further provision, besides those provided in the colonization laws, that within eighteen months they shall use every effort to prevent their land from lying idle, and

thereby lose their title thereto, and be given to others who will cultivate them.

The following are the individuals to whom lands were distributed, which list shall be attached to the general grant:

Juan Pedro Archuleta ..... 50 varas.
Jesus Gallego ..... 50 "
José Candalaria Garcia ..... 50 "
Rafael Rodriguez ..... 50 "
José Martin ..... 50 "
Eujogio Gonzalez ..... 50 "

HILARIO GONZALEZ. [Rubric.]

Attending,
ANTONIO SAENS. [Rubric.]
Attending,
RAMON GARCIA. [Rubric.]

SURVEYOR GENERAL'S OFFICE,
Translator's Department, Santa Fé, N. M., July 10, 1857.

The above is a correct translation of the original on file in this office.

DAVID V. WHITING,
Translator.

SURVEYOR GENERAL'S OFFICE,
Santa Fé, New Mexico, August 20, 1859.

The above is a true copy of the original on file in this office.

WM. PELHAM,
Surveyor General.

REPORT.

The heirs of Luis Maria Baca and the town of Las Vegas.

The first of the above-mentioned cases was filed in this office on the 19th of June, 1855, and the second on the 11th of September of the same year.

These cases were set for trial at different periods, but owing to the absence of counsel and witnesses were not brought to a final close until the 10th of December, 1858.

The claim of the heirs of Luis Maria Baca is based on the following facts, as set forth in the original papers filed in the office by the claimants:

On the 16th of January, 1821, Luis Maria Cabeza de Baca, in his own name and that of seventeen male children, petitioned the provincial deputation of the State of Durango, under whose jurisdiction he avers the province of New Mexico then was, for a tract of public land suitable for cultivation and pasture, called the Vegas Grandes, on the Gallinas river, in the jurisdiction of El Bado. In this petition he states that a like petition had been made to the authorities of the province of New Mexico, and that by a decree of the 18th of February, 1820, the land was granted to him and eight other persons; but as these persons already possessed land elsewhere, they took no interest in its cultivation, and prays that the grant be made to himself and his aforementioned children, with the following boundaries, to wit: On the north the Chapellote river, on the south the boundary of El Bado, on the west the summit of the Pecos mountain, and on the east the Aguage de la Llegua and the boundary of Don Antonio Ortiz. On the 29th of May, Diego Garcia Conde and

Miguel de Zubiria, president and secretary of the provincial deputation of Durango, informed Facando Melgares, the governor of New Mexico, that on the supposition that the companions of Don Luis Maria Cabeza de Baca had other lands whereon to pasture their cattle, that deputation had determined to confer upon the said Baca the land commonly called Vegas Grandes, provided the other parties had erected no buildings on the land or made any other improvements, unless it was voluntarily agreed between the parties that Baca should reimburse them for any improvements they might have made, and that an equal quantity of land should be assigned to them wherever they would select it, in place of those donated to Baca; and the governor of New Mexico was requested to inform the parties of what had been done.

On the 17th day of October, 1823, Bartolomé Baca, political chief of New Mexico, directed the alcalde of El Bado to place Luis Maria Cabeza de Baca in possession of the land called for in his petition, as the eight individuals who accompanied him in his first petition had placed no improvements on the land; and the alcalde was required to certify at the foot of the order the proceedings had by him in the premises.

On the 27th day of February, 1825, Juan Bautista Vigil, the secretary of the most excellent deputation of New Mexico, certified that at the session of the 16th of the same month a petition of Don Juan Antonio Cabeza de Baca, son of Luis Maria C. de Baca, and one of the grantees, was read, in which he refers to the grant made in the year 1821 by the provincial deputation of Durango, *to which corporation New Mexico at that time belonged*, and it was resolved that a record of the proceedings in the case

be made and a true copy thereof given to the petitioner, and ratifying the grant made by the corporation of Durango on the date aforementioned. The petitioner was required to present himself before the territorial justice of El Bado with the copy above referred to, who, having then there the grant made to Salvador Montoya, was required to place the aforesaid Luis Maria Baca and male children in possession of the aforesaid land, in accordance with the proceedings had in the premises and without injury to any third party.

On the 26th of December, 1825, Tomas Sena, the constitutional justice of El Bado, assigned as a reason for not placing the parties in possession of the land, as he had been ordered to do, that a proclamation had been issued for the election of his successor, at which he was compelled to attend, and that on the second day after the election had commenced he was taken violently ill, and was compelled to postpone the election, as was well known to the messengers of Don Luis Maria Cabeza de Baca.

On the 13th of January, 1826, Governor Narbona again ordered the constitutional justice to place the parties in possession of the land granted.

The testimony of Manuel Antonio Baca shows that the parties were placed in possession of the land, although there is no documentary evidence of the fact.

The claim of Las Vegas is based on the following proceedings:

On the 20th day of March, 1835, Juan de Dios Maese, Miguel Archuleta, Manuel Duran, and José Antonio

Casaos, for themselves and in the name of twenty-five others, petitioned the corporation of El Bado for a tract of land for cultivation and pasture situated in the county of El Bado and bounded as follows: on the north by the Sapello river, on the south by the boundary of the grant of Don Antonio Ortiz, on the east by the Aguage de la Llegus, and on the west by the boundary of the town of El Bado.

On the same day the corporation of El Bado transmitted the petition to the territorial deputation, with the recommendation that the petition be granted.

On the 23d of March of the same year the grant was made by the territorial deputation with the boundaries asked for, with the further provision that persons who owned no lands were to be allowed the same privilege of settling upon the grant as those who petitioned for it.

On the 24th of the same month and year Francisco Sarracino, the acting governor or political chief, directed the constitutional justice of El Bado to place the parties in possession, which was done on the 6th day of April of the same year.

It is not supposed that Congress intended, upon the establishment of the office of the surveyor general of New Mexico, that he should be required to determine questions of right between parties, but simply to ascertain whether the claims presented to him were of such a nature as to separate the land embraced within the boundaries set forth in them from the public domain, and that conflicting claims between parties should be adjudicated before the proper tribunals of the country having jurisdiction in the premises.

Under this view of the case it will not be necessary to refer to any other points made by counsel than those touching the sufficiency of the titles given and under which the respective parties claim.

It is contended by the last grantees that the concession made to Baca by the provincial deputation of Durango was void for want of power in the tribunal that assumed to make it.

At the time the grant was made to Baca the country was in a state of confusion, arising from the severance of Mexico from the parent country. Many of the States had not yet given their adhesion to the new order of things, and in some places, as remote in the interior as New Mexico, were not even aware that a new order of things had been established; therefore the several authorities of the country exercised the power intrusted to them by the king of Spain or his lawful authorities, and as it is not disavowed that the State of Durango held jurisdiction over the province of New Mexico, it is supposed, even in the absence of any positive proof, that the deputation of that State acted within the scope of its authority when it made the grant to Baca; but in the confirmation of the grant by the territorial deputation of New Mexico in 1825, it is conceded that the province of New Mexico was under the jurisdiction of that State, and that any grant made by its legally constituted authorities was a good and valid one. In the case under consideration, no condition was attached; the grant was an absolute one. It has been held by our courts that where no conditions were attached they could not be raised by implication. So satisfied was Governor Melgares that the deputation of Durango had a right to make the concession, that he

ordered the grantees to be placed in immediate possession, which he would not have done had he doubted in the least that the authorities of that State had exceeded their powers in granting lands in the province over which he presided as governor.

But supposing the grant made to Baca by the deputation of Durango to have been null and void, its confirmation by the territorial deputation of New Mexico in 1825, at which period, it is not denied, it had the power to grant lands, would be equivalent to a new grant; and, as it is complete in itself so far as the severance of the land granted is concerned, to separate it from the public domain, it is a matter of very little importance whether the former grant by the deputation of Durango was valid or not. This grant is therefor deemed to be a good and valid one.

The grant made to Juan de Dios Maese and others is not contested on the ground of any want of formality in the proceedings, but, as far as the documentary evidence shows, is made in strict conformity with the laws and usages of the country at the time.

Testimony is introduced to show that the heirs of Baca protested in 1837 against the occupancy of the land by the claimants under the latter grant, and that they went upon the land knowing the existence of a prior grant; but as these matters are not deemed to be pertinent to the case so far as this office is concerned, it is not necessary to comment upon them.

It is firmly believed that the land embraced in either of the two grants is lawfully separated from the public domain and entirely beyond the disposal of the general

government, and that in the absence of the one the other would be a good and valid grant; but as this office has no power to decide between conflicting parties, they are referred to the proper tribunals of the country for the adjudication of their respective claims, and the case is hereby respectfully referred to Congress through the proper channel for its action in the premises.

WM. PELHAM, *Surveyor General.*

SURVEYOR GENERAL'S OFFICE,

Santa Fé. New Mexico December 18, 1858..

TREATY OF PEACE, FRIENDSHIP, LIMITS, AND SETTLEMENT WITH THE REPUBLIC OF MEXICO.

In the name of Almighty God:

The United States of America and the United Mexican States, animated by a sincere desire to put an end to the calamities of the war which unhappily exists between the two republics, and to establish upon a solid basis relations of peace and friendship, which shall confer reciprocal benefits upon the citizens of both, and assure the concord, harmony, and mutual confidence wherein the two people should live, as good neighbors, have for that purpose appointed their respective plenipotentiaries – that is to say, the President of the United States, has appointed Nicholas P. Trist, a citizen of the United States, and the President of the Mexican republic has appointed Don Luis Gonzaga Cuevas, Don Bernardo Couto, and Don Miguel Atristain, citizens of the said republic, who, after a reciprocal communication of their respective full powers, have, under the protection of Almighty God, the author of peace, arranged, agreed upon, and signed the following

Treaty of Peace, Friendship, Limits, and Settlement Between the United States of America and the Mexican Republic.

ARTICLE I.

There shall be firm and universal peace between the United States of America and the Mexican republic, and between their respective countries, territories, cities, towns, and people without exception of places or persons.

ARTICLE II.

Immediately upon the signature of this treaty, a convention shall be entered into between a commissioner or commissioners appointed by the General-in-chief of the forces of the United States, and such as may be appointed by the Mexican government, to the end that a provisional suspension of hostilities shall take place, and that, in the places occupied by the said forces, constitutional order may be reestablished, as regards the political, administrative, and judicial branches, so far as this shall be permitted by the circumstances of military occupation.

ARTICLE III.

Immediately upon the ratification of the present treaty by the government of the United States, orders shall be transmitted to the commanders of their land and naval forces, requiring the latter (provided this treaty shall then have been ratified by the government of the Mexican republic, and the ratifications exchanged) immediately to desist from blockading any Mexican ports; and requiring the former (under the same condition) to commence at the earliest moment practicable, withdrawing all troops of the United States then in the interior of the Mexican republic, to points that shall be selected by common agreement, as a distance from the seaports not exceeding thirty leagues; and such evacuation of the interior of the republic shall be completed with the least possible delay; the Mexican government hereby binding itself to afford every facility in its power for rendering the same convenient to the troops, on their march and in

their new positions, and for promoting a good understanding between them and the inhabitants. In like manner orders shall be despatched to the persons in charge of the custom-houses at all ports occupied by the forces of the United States, requiring them (under the same condition) immediately to deliver possession of the same to the persons authorized by the Mexican government to receive it, together with all bonds and evidences of debt for duties on importations and on exportations, not yet fallen due. Moreover, a faithful and exact account shall be made out, showing the entire amount of all duties on imports and on exports, collected at such custom-houses, or elsewhere in Mexico, by authority of the United States, from and after the day of the ratification of this treaty by the government of the Mexican republic; and also an account of the cost of collection; and such entire amount, deducting only the cost of collection, shall be delivered to the Mexican government, at the city of Mexico, within three months after the exchange of ratifications.

The evacuation of the capital of the Mexican republic by the troops of the United States, in virtue of the above stipulation, shall be completed in one month after the orders there stipulated for shall have been received by the commander of said troops, or sooner if possible.

ARTICLE IV.

Immediately after the exchange of ratifications of the present treaty, all castles, forts, territories, places, and possessions, which have been taken or occupied by the forces of the United States during the present war, within

the limits of the Mexican republic, as about to be established by the following article, shall be definitively restored to the said republic, together with all the artillery, arms, apparatus of war, munitions, and other public property, which were in the said castles and forts when captured, and which shall remain there at the time when this treaty shall be duly ratified by the government of the Mexican republic. To this end, immediately upon the signature of this treaty, orders shall be despatched to the American officers commanding such castles and forts, securing against the removal or destruction of any such artillery, arms, apparatus of war, munitions, or other public property. The city of Mexico, within the inner line of intrenchments surrounding the said city, is comprehended in the above stipulations, as regards the restoration of artillery, apparatus of war, &c.

The final evacuation of the territory of the Mexican republic, by the forces of the United States, shall be completed in three months from the said exchange of ratifications, or sooner if possible: the Mexican government hereby engaging, as in the foregoing article to use all means in its power for facilitating such evacuation, and rendering it convenient to the troops, and for promoting a good understanding between them and the inhabitants.

If, however, the ratification of this treaty by both parties should not take place in time to allow the embarcation of the troops of the United States to be completed before the commencement of the sickly season, at the Mexican ports of the Gulf of Mexico, in such case a friendly arrangement shall be entered into between the

General-in-chief of the said troops and the Mexican government, whereby healthy and otherwise suitable places, at a distance from the ports not exceeding thirty leagues, shall be designated for the residence of such troops as may not yet have embarked, until the return of the healthy season. And the space of time here referred to as comprehending the sickly season, shall be understood to extend from the first day of May to the first day of November.

All prisoners of war taken on either side, on land or on sea, shall be restored as soon as practicable after the exchange of ratifications of this treaty. It is also agreed that if any Mexicans should now be held as captives by any savage tribe within the limits of the United States, as about to be established by the following article, the government of the said United States will exact the release of such captives, and cause them to be restored to their country.

ARTICLE V.

The boundary line between the two republics shall commence in the Gulf of Mexico, three leagues from land, opposite the mouth of the Rio Grande, otherwise called Rio Bravo Del Norte, or opposite the mouth of its deepest branch, if it should have more than one branch emptying directly into the sea; from thence up the middle of that river, following the deepest channel, where it has more than one, to the point where it strikes the southern boundary of New Mexico; thence, westwardly, along the whole southern boundary of New Mexico (which runs north of the town called *Paso*) to its western termination;

thence, northward, along the western line of New Mexico, until it intersects the first branch of the River Gila; (or if it should not intersect any branch of that river, then to the point on the said line nearest to such branch, and thence in a direct line to the same;) thence down the middle of the said branch and of the said river, until it empties into the Rio Colorado; thence across the Rio Colorado, following the division line between Upper and Lower California, to the Pacific Ocean.

The southern and western limits of New Mexico, mentioned in this article, are those laid down in the map entitled *"Map of the United Mexican States, as organized and defined by various acts of the Congress of said republic, and constructed according to the best authorities. Revised edition. Published at New York, in 1847, by J. Disturnell."* Of which map a copy is added to this treaty, bearing the signatures and seals of the undersigned plenipotentiaries. And, in order to preclude all difficulty in tracing upon the ground the limit separating Upper from Lower California, it is agreed that the said limit shall consist of a straight line drawn from the middle of the Rio Gila, where it unites with the Colorado, to a point on the coast of the Pacific Ocean distant one marine league due south of the southernmost point of the port of San Diego, according to the plan of said port made in the year 1782 by Don Juan Pantoja, second sailing-master of the Spanish fleet, and published at Madrid in the year 1802, in the Atlas to the voyage of the schooners *Sutil* and *Mexicana*, of which plan a copy is hereunto added, signed and sealed by the respective plenipotentiaries.

In order to designate the boundary line with due precision, upon authoritative maps, and to establish upon

the ground landmarks which shall show the limits of both republics, as described in the present article, the two governments shall each appoint a commissioner and a surveyor, who, before the expiration of one year from the date of the exchange of ratifications of this treaty, shall meet at the port of San Diego, and proceed to run and mark the said boundary in its whole course to the mouth of the Rio Bravo del Norte. They shall keep journals and make out plans of their operations; and the result agreed upon by them shall be deemed a part of this treaty, and shall have the same force as if it were inserted therein. The two governments will amicably agree regarding what may be necessary to these persons, and also as to their respective escorts, should such be necessary.

The boundary line established by this article shall be religiously respected by each of the two republics, and no change shall ever be made therein, except by the express and free consent of both nations, lawfully given by the general government of each in conformity with its own constitution.

ARTICLE VI.

The vessels and citizens of the United States shall, in all time, have a free and uninterrupted passage by the Gulf of California, and by the River Colorado below its confluence with the Gila, to and from their possessions situated north of the boundary line defined in the preceding article; it being understood that this passage is to be by navigating the Gulf of California and the River Colorado, and not by land, without the express consent of the Mexican government.

If, by the examinations which may be made, it should be ascertained to be practicable and advantageous to construct a road, canal, or railway, which should in whole or in part run upon the River Gila, or upon its right or its left bank, within the space of one marine league from either margin of the river, the governments of both republics will form an agreement regarding its construction, in order that it may serve equally for the use and advantage of both countries.

ARTICLE VII.

The River Gila, and the part of the Rio Bravo del Norte lying below the southern boundary of New Mexico, being, agreeably to the fifth article, divided in the middle between the two republics, the navigation of the Gila and of the Bravo below said boundary shall be free and common to the vessels and citizens of both countries; and neither shall, without the consent of the other, construct any work that may impede or interrupt, in whole or in part, the exercise of this right; not even for the purpose of favoring new methods of navigation. Nor shall any tax or contribution, under any denomination or title, be levied upon vessels, or persons navigating the same, or upon merchandise or effects transported thereon, except in the case of landing upon one of their shores. If, for the purpose of making the said rivers navigable, or for maintaining them in such state, it should be necessary or advantageous to establish any tax or contribution, this shall not be done without the consent of both governments.

The stipulations contained in the present article shall not impair the territorial rights of either republic within its established limits.

ARTICLE VIII.

Mexicans now established in territories previously belonging to Mexico, and which remain for the future within the limits of the United States, as defined by the present treaty, shall be free to continue where they now reside, or to remove at any time to the Mexican republic, retaining the property which they possess in the said territories, or disposing thereof, and removing the proceeds wherever they please, without their being subjected, on this account, to any contribution, tax, or charge whatever.

Those who shall prefer to remain in the said territories, may either retain the title and rights of Mexican citizens, or acquire those of citizens of the United States. But they shall be under the obligation to make their election within one year from the date of the exchange of ratifications of this treaty; and those who shall remain in the said territories after the expiration of that year, without having declared their intention to retain the character of Mexicans, shall be considered to have elected to become citizens of the United States.

In the said territories, property of every kind, now belonging to Mexicans not established there, shall be inviolably respected. The present owners, the heirs of these, and all Mexicans who may hereafter acquire said

property by contract, shall enjoy with respect to it guaranties equally ample as if the same belonged to citizens of the United States.

ARTICLE IX.

Mexicans who, in the territories aforesaid, shall not preserve the character of citizens of the Mexican republic, conformably with what is stipulated in the preceding article, shall be incorporated into the Union of the United States, and be admitted at the proper time (to be judged of by the Congress of the United States) to the enjoyment of all the rights of citizens of the United States, according to the principles of the constitution; and in the mean time shall be maintained and protected in the free enjoyment of their liberty and property, and secured in the free exercise of their religion without restriction.

ARTICLE X.

[Stricken out.]

ARTICLE XI.

Considering that a great part of the territories which, by the present treaty, are to be comprehended for the future within the limits of the United States, is now occupied by savage tribes, who will hereafter be under the exclusive control of the government of the United States, and whose incursions within the territory of Mexico would be prejudicial in the extreme, it is solemnly agreed that all such incursions shall be forcibly restrained by the government of the United States whensoever this

may be necessary; and that when they cannot be prevented, they shall be punished by the said government, and satisfaction for the same shall be exacted – all in the same way, and with equal diligence and energy, as if the same incursions were meditated or committed within its own territory, against its own citizens.

It shall not be lawful, under any pretext whatever, for any inhabitant of the United States to purchase or acquire any Mexican, or any foreigner residing in Mexico, who may have been captured by Indians inhabiting the territory of either of the two republics, nor to purchase or acquire horses, mules, cattle, or property of any kind, stolen within Mexican territory by such Indians.

And in the event of any person or persons, captured within Mexican territory by Indians, being carried into the territory of the United States, the government of the later engages and binds itself, in the most solemn manner, so soon as it shall know of such captives being within its territory, and shall be able so to do, through the faithful exercise of its influence and power, to rescue them and return them to their country, or deliver them to the agent or representative of the Mexican government. The Mexican authorities will, as far as practicable, give to the government of the United States notice of such captures; and its agent shall pay the expenses incurred in the maintenance and transmission of the rescued captives; who, in the mean time, shall be treated with the utmost hospitality by the American authorities at the place where they may be. But if the government of the United States, before receiving such notice from Mexico, should obtain intelligence, through any other channel, of the existence of Mexican captives within its territory, it will

proceed forthwith to effect their release and delivery to the Mexican agent, as above stipulated.

For the purpose of giving to these stipulations the fullest possible efficacy, thereby affording the security and redress demanded by their true spirit and intent, the government of the United States will now and hereafter pass, without unnecessary delay, and always vigilantly enforce, such laws as the nature of the subject may require. And finally, the sacredness of this obligation shall never be lost sight of by the said government when providing for the removal of the Indians from any portion of the said territories, or for its being settled by citizens of the United States; but on the contrary, special care shall then be taken not to place its Indian occupants under the necessity of seeking new homes, by committing those invasions which the United States have solemnly obliged themselves to restrain.

ARTICLE XII.

In consideration of the extension acquired by the boundaries of the United States, as defined in the fifth article of the present treaty, the government of the United States engages to pay to that of the Mexican republic the sum of fifteen millions of dollars.

Immediately after this treaty shall have been duly ratified by the government of the Mexican republic, the sum of three millions of dollars shall be paid to the said government by that of the United States, at the city of Mexico, in the gold or silver coin of Mexico. The remaining twelve millions of dollars shall be paid at the same place, and in the same coin, in annual instalments of

three millions of dollars each, together with interest on the same at the rate of six per centum per annum. This interest shall begin to run upon the whole sum of twelve millions from the day of the ratification of the present treaty by the Mexican government., and the first of the installments shall be paid at the expiration of one year from the same day. Together with each annual installment, as it falls due, the whole interest accruing on such installment from the beginning shall also be paid.

ARTICLE XIII.

The United States engage, moreover, to assume and pay to the claimants all the amounts now due them, and those hereafter to become due, by reason of the claims already liquidated and decided against the Mexican republic, under the conventions between the two republics severally concluded on the eleventh day of April, eighteen hundred and thirty-nine, and on the thirtieth day of January, eighteen hundred and forty-three; so that the Mexican republic shall be absolutely exempt, for the future, from all expense whatever on the account of the said claims.

ARTICLE XIV.

The United States do furthermore discharge the Mexican republic from all claims of citizens of the United States, not heretofore decided against the Mexican government, which may have arisen previously to the date of the signature of this treaty; which discharge shall be final and perpetual, whether the said claims be rejected or be allowed by the board of commissioners provided for in

the following article, and whatever shall be the total amount of those allowed.

ARTICLE XV.

The United States, exonerating Mexico from all demands on account of the claims of their citizens mentioned in the preceding article, and considering them entirely and forever cancelled, whatever their amount may be, undertake to make satisfaction for the same, to an amount not exceeding three and one quarter millions of dollars. To ascertain the validity and amount of those claims, a board of commissioners shall be established by the government of the United States, whose awards shall be final and conclusive: provided, that in deciding upon the validity of each claim, the board shall be guided and governed by the principles and rules of decisions prescribed by the first and fifth articles of the unratified convention, concluded at the city of Mexico on the twentieth day of November, one thousand eight hundred and forty-three;* and in no case shall an award be made in favor of any claim not embraced by these principles and rules.

If, in the opinion of the said board of commissioners, or of the claimants any books records or documents in the possession or power of the government of the Mexican republic, shall be deemed necessary to the just decision of any claim, the commissioners, or the claimants through them, shall, within such period as Congress may designate, make an application in writing for the same,

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* For these articles, see the end of this treaty, p. 128.

addressed to the Mexican Minister for Foreign Affairs, to be transmitted by the Secretary of State of the United States; and the Mexican government engages at the earliest possible moment after the receipt of such demand, to cause any of the books, records, or documents, so specified, which shall be in their possession or power, (or authenticated copies or extracts of the same,) to be transmitted to the said Secretary of State, who shall immediately deliver them over to the said board of commissioners: *Provided*, That no such application shall be made by, or at the instance of, any claimant, until the facts which it is expected to prove by such books, records, or documents, shall have been stated under oath or affirmation.

ARTICLE XVI.

Each of the contracting parties reserves to itself the entire right to fortify whatever point within its territory it may judge proper so to fortify, for its security.

ARTICLE XVII.

The treaty of amity, commerce, and navigation, concluded at the city of Mexico on the fifth day of April. A. D. 1831, between the United States of America and the United Mexican States, except the additional article, and except so far as the stipulations of the said treaty may be incompatible with any stipulation contained in the present treaty, is hereby revived for the period of eight years from the day of the exchange of ratifications of this treaty, with the same force and virtue as if incorporated therein; it being understood that each of the contracting parties

reserves to itself the right, at any time after the said period of eight years shall have expired, to terminate the same by giving one year's notice of such intention to the other party.

ARTICLE XVIII.

All supplies whatever for troops of the United States in Mexico, arriving at ports in the occupation of such troops previous to the final evacuation thereof, although subsequently to the restoration of the custom-houses at such ports, shall be entirely exempt from duties and charges of any kind: the government of the United States hereby engaging and pledging its faith to establish, and vigilantly to enforce, all possible guards for securing the revenue of Mexico, by preventing the importation, under cover of this stipulation, of any articles other than such, both in kind and in quantity, as shall really be wanted for the use and consumption of the forces of the United States during the time they may remain in Mexico. To this end, it shall be the duty of all officers and agents of the United States to denounce to the Mexican authorities at the respective ports any attempts at a fraudulent abuse of this stipulation which they may know of or may have reason to suspect, and to give to such authorities all the aid in their power with regard thereto; and every such attempt, when duly proved and established by sentence of a competent tribunal, shall be punished by the confiscation of the property so attempted to be fraudulently introduced.

ARTICLE XIX.

With respect to all merchandise, effects, and property whatsoever, imported into ports of Mexico whilst in the occupation of the forces of the United States, whether by citizens of either republic, or by citizens or subjects of any neutral nation, the following rules shall be observed: –

1. All such merchandise, effects, and property, if imported previously to the restoration of the custom-houses to the Mexican authorities, as stipulated for in the third article of this treaty, shall be exempt from confiscation, although the importation of the same be prohibited by the Mexican tariff.

2. The same perfect exemption shall be enjoyed by all such merchandise, effects, and property, imported subsequently to the restoration of the custom-houses, and previously to the sixty days fixed in the following article for the coming into force of the Mexican tariff at such ports respectively; the said merchandise, effects, and property being, however, at the time of their importation, subject to the payment of duties, as provided for in the said following article.

3. All merchandise, effects, and property described in the two rules foregoing shall, during their continuance at the place of importation, and upon their leaving such place for the interior, be exempt from all duty, tax, or impost of every kind, under whatsoever title or denomination. Nor shall they be there subjected to any charge whatsoever upon the sale thereof.

4. All merchandise, effects, and property, described in the first and second rules, which shall have been

removed to any place in the interior whilst such place was in the occupation of the forces of the United States, shall, during their continuance therein, be exempt from all tax upon the sale or consumption thereof, and from every kind of impost or contribution, under whatsoever title or denomination.

5. But if any merchandise, effects, or property, described in the first and second rules, shall be removed to any place not occupied at the time by the forces of the United States, they shall, upon their introduction into such place, or upon their sale or consumption there, be subject to the same duties, which, under the Mexican laws, they would be required to pay in such cases if they had been imported in time of peace, through the maritime custom-houses, and had there paid the duties conformably with the Mexican tariff.

6. The owners of all merchandise, effects, or property described in the first and second rules, and existing in any port of Mexico, shall have the right to reship the same, exempt from all tax, impost, or contribution whatever.

With respect to the metals, or other property, exported from any Mexican port whilst in the occupation of the forces of the United States, and previously to the restoration of the custom-house at such port, no person shall be required by the Mexican authorities, whether general or state, to pay any tax, duty, or contribution upon any such exportation, or in any manner to account for the same to the said authorities.

ARTICLE XX.

Through consideration for the interests of commerce generally, it is agreed, that if less than sixty days should elapse between the date of the signature of this treaty and the restoration of the custom-houses, conformably with the stipulation in the third article, in such case all merchandise, effects, and property whatsoever, arriving at the Mexican ports after the restoration of the said custom-houses, and previously to the expiration of sixty days after the day of the signature of this treaty, shall be admitted to entry; and no other duties shall be levied thereon than the duties established by the tariff found in force at such custom-houses at the time of the restoration of the same. And to all such merchandise, effects, and property, the rules established by the preceding article shall apply.

ARTICLE XXI.

If unhappily any disagreement should hereafter arise between the governments of the two republics, whether with respect to the interpretation of any stipulation in this treaty, or with respect to any other particular concerning the political or commercial relations of the two nations, the said governments, in the name of those nations, do promise to each other that they will endeavor, in the most sincere and earnest manner, to settle the differences so arising, and to preserve the state of peace and friendship in which the two countries are now placing themselves; using, for this end, mutual representations and pacific negotiations. And if, by these means, they should not be enabled to come to an agreement, a

resort shall not, on this account, be had to reprisals, aggression, or hostility of any kind, by the one republic against the other, until the government of that which deems itself aggrieved shall have maturely considered, in the spirit of peace and good neighborship, whether it would not be better that such difference should be settled by the arbitration of commissioners appointed on each side, or by that of a friendly nation. And should such course be proposed by either party, it shall be acceded to by the other, unless deemed by it altogether incompatible with the nature of the difference, or the circumstances of the case.

ARTICLE XXII.

If (which is not to be expected, and which God forbid!) war should unhappily break out between the two republics, they do now, with a view to such calamity, solemnly pledge themselves to each other and to the world, to observe the following rules; absolutely where the nature of the subject permits, and as closely as possible in all cases where such absolute observance shall be impossible: –

1. The merchants of either republic then residing in the other shall be allowed to remain twelve months, (for those dwelling in the interior,) and six months (for those dwelling at the seaports,) to collect their debts and settle their affairs; during which periods, they shall enjoy the same protection, and be on the same footing, in all respects, as the citizens or subjects of the most friendly nations; and, at the expiration thereof, or at any time before, they shall have full liberty to depart, carrying off

all their effects without molestation or hindrance, conforming therein to the same laws which the citizens or subjects of the most friendly nations are required to conform to. Upon the entrance of the armies of either nation into the territories of the other, women and children, ecclesiastics, scholars of every faculty, cultivators of the earth, merchants, artisans, manufacturers, and fishermen, unarmed and inhabiting unfortified towns, villages, or places, and in general all persons whose occupations are for the common subsistence and benefit of mankind, shall be allowed to continue their respective employments unmolested in their persons. Nor shall their houses or goods be burnt or otherwise destroyed, nor their cattle taken, nor their fields wasted, by the armed force into whose power, by the events of war, they may happen to fall; but if the necessity arise to take any thing from them for the use of such armed force, the same shall be paid for at an equitable price. All churches, hospitals, schools, colleges, libraries, and other establishments for charitable and beneficent purposes, shall be respected, and all persons connected with the same protected in the discharge of their duties, and the pursuit of their vocations.

2. In order that the fate of prisoners of war may be alleviated, all such practices as those of sending them into distant inclement or unwholesome districts, or crowding them into close and noxious places, shall be studiously avoided. They shall not be confined in dungeons, prison-ships, or prisons; nor be put in irons, or bound, or otherwise restrained in the use of their limbs. The officers shall enjoy liberty on their paroles, within convenient districts, and have comfortable quarters; and the common soldier shall be disposed in cantonments,

open and extensive enough for air and exercise, and lodged in barracks as roomy and good as are provided by the party in whose power they are for its own troops. But if any officer shall break his parole by leaving the district so assigned him, or any other prisoner shall escape from the limits of his cantonment, after they shall have been designated to him, such individual, officer, or other prisoner, shall forfeit so much of the benefit of this article as provides for his liberty on parole or in cantonment. And if any officer so breaking his parole, or any common soldier so escaping from the limits assigned him, shall afterwards be found in arms, previously to his being regularly exchanged, the person so offending shall be dealt with according to the established laws of war. The officers shall be daily furnished by the party in whose power they are, with as many rations, and of the same articles, as are allowed, either in kind or by commutation, to officers of equal rank in its own army; and all others shall be daily furnished with such ration as is allowed to a common soldier in its own service: the value of all which supplies shall, at the close of the war, or at periods to be agreed upon between the respective commanders, be paid by the other party, on a mutual adjustment of accounts for the subsistence of prisoners; and such accounts shall not be mingled with or set off against any others, nor the balance due on them be withheld, as a compensation or reprisal for any cause whatever, real or pretended. Each party shall be allowed to keep a commissary of prisoners, appointed by itself, with every cantonment of prisoners, in possession of the other; which commissary shall see the prisoners as often as he pleases; shall be allowed to receive, exempt from all duties or

taxes, and to distribute, whatever comforts may be sent to them by their friends; and shall be free to transmit his reports in open letters to the party by whom he is employed.

And it is declared that neither the pretense that war dissolves all treaties, nor any other whatever, shall be considered as annulling or suspending the solemn covenant contained in this article. On the contrary, the state of war is precisely that for which it is provided: and during which, its stipulations are to be as sacredly observed as the most acknowledged obligations under the law of nature or nations.

ARTICLE XXIII.

This treaty shall be ratified by the President of the United States of America, by and with the advise and consent of the Senate thereof; by the President of the Mexican republic, with the previous approbation of its General Congress; and the ratifications shall be exchanged in the city of Washington, or at the seat of government of Mexico, in four months from the date of the signature hereof, or sooner if practicable.

In faith whereof, we the respective plenipotentiaries, have signed this treaty of peace, friendship, limits, and settlement; and have hereunto affixed our seals respectively. Done in quintuplicate, at the city of Guadalupe Hidalgo, on the second day of February, in the year of our Lord one thousand eight hundred and forty-eight.

N.P. TRIST, [L. S.]
LUIS G. CUEVAS, [L. S.]

BERNARDO COUTO, [L. S.]

MIGL. ATRISTAIN, [L. S.]

ARTICLES REFERRED TO IN THE FIFTEENTH ARTICLE OF THE PRECEDING TREATY.

First and Fifth Articles of the unratified Convention between the United States and the Mexican Republic of the 20th November, 1543.

ARTICLE I.

All claims of citizens of the Mexican republic against the government of the United States, which shall be presented in the manner and time hereinafter expressed, and all claims of citizens of the United States against the government of the Mexican republic, which, for whatever cause, were not submitted to, nor considered, nor finally decided by, the commission, nor by the arbiter appointed by the convention of 1839, and which shall be presented in the manner and time hereinafter specified, shall be referred to four commissioners, who shall form a board, and shall be appointed in the following manner, that is to say: Two commissioners shall be appointed by the President of the Mexican republic, and the other two by the President of the United States with the approbation and consent of the Senate. The said commissioners, thus appointed, shall, in presence of each other, take an oath to examine and decide impartially the claims submitted to them, and which may lawfully be considered, according to the proofs which shall be presented, the principles of right and justice, the law of nations and the treaties between the two republics.

ARTICLE V.

All claims of citizens of the United States against the government of the Mexican republic, which were considered by the commissioners, and referred to the umpire appointed under the convention of the eleventh April, 1839, and which were not decided by him, shall be referred to, and decided by, the umpire to be appointed, as provided by this convention, on the points submitted to the umpire under the late convention, and his decision shall be final and conclusive. It is also agreed, that if the respective commissioners shall deem it expedient, they may submit to the said arbiter new arguments upon the said claims.

CHAP. CIII. – *An Act to establish the offices of Surveyor-General of New Mexico, Kansas, and Nebraska, to grant Donations to actual Settlers therein, and for other purposes.*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the President, by and with the advice and consent of the Senate, shall be, and he is hereby, authorized to appoint a Surveyor-General for New Mexico, whose annual salary shall be three thousand dollars, and whose power, authority, and duties shall be the same as those provided by law for the Surveyor-General of Oregon; he shall have proper allowances for clerk hire, office rent, and fuel, not exceeding what now is or hereafter may be allowed by law to the said Surveyor-General of Oregon; and he shall locate his office from time to time at such places as may be directed by the President of the United States.

SEC. 2. *And be it further enacted,* That, to every white male citizen of the United States, or every white male above the age of twenty-one years who has declared his intention to become a citizen, and who was residing in said Territory prior to the first day of January, eighteen hundred and fifty-three, and who may be still residing there, there shall be, and hereby is, donated one quarter section, or one hundred and sixty acres of land. And to every white male citizen of the United States, or every white male above the age of twenty-one years, who has declared his intention to become a citizen, and who shall have removed or shall remove to and settle in said Territory between the first day of January, eighteen hundred and fifty-three, and the first day of January, eighteen hundred and fifty-eight, there shall in like manner be donated one quarter-section, or one hundred and sixty

acres, on condition of actual settlement and cultivation for not less than four years: *Provided, however,* That each of said donations shall include the actual settlement and improvement of the donee, and shall be selected by legal subdivisions, within three months after the survey of the land where the settlement was made before the survey; and where the settlement was made after the survey, then within three months after the settlement has been made; and all persons failing to designate the boundaries of their claims within that time, shall forfeit all right to the same.

SEC. 3. *And be it further enacted,* That, on proof of the settlement and cultivation required by this act, to the satisfaction of the surveyor-general, or other officer designated by law for that purpose, subject to the supervision of the Secretary of the Interior, a certificate shall be issued to the party entitled, on presentation of which, if approved by the Secretary of the Interior, a patent shall issue thereon: *Provided, however,* That on the death of any such settler before the completion of the four years' occupancy and cultivation required by this act, the right shall descend to his heirs at law, who shall be entitled to a certificate and patent, as aforesaid, on proof, as before provided, of continued occupancy and cultivation by such settler to the time of his death: *Provided, however,* That when lands are claimed under any of the provisions of this act by persons who are not citizens of the United States, patents shall not issue therefor until they become citizens.

SEC. 4. *And be it further enacted,* That none of the provisions of this act shall extend to mineral or school lands, salines, military or other reservations, or lands

settled on and occupied for purpose of trade and commerce, and not for agriculture, and all legal subdivisions settled on and occupied, in whole or in part, for purposes of trade and commerce, and not for agriculture, shall be subject to the provisions of the act of twenty-third of May, eighteen hundred and forty-four, in relation to town sites on the public lands, whether so settled and occupied before or after the survey of said lands, except that said lands shall be donated instead of being sold.

SEC. 5. *And be it further enacted,* That when the lands in the said Territory shall be surveyed, under the direction of the Government of the United States, preparatory to bringing the same into market, sections numbered sixteen and thirty-six in each township, in said Territory, shall be, and the same are hereby, reserved for the purpose of being applied to schools in said Territory, and in the States and Territories hereafter to be created out of the same.

SEC. 6. *And be it further enacted,* That, when the lands in said Territory shall be surveyed as aforesaid, a quantity of land equal to two townships shall be, and the same is hereby, reserved for the establishment of a University in said Territory, and in the State hereafter to be created out of the same, to be selected, under the direction of the legislature, in legal subdivisions of not less than one half-section.

SEC. 7. *And be it further enacted,* That any of the lands not taken under the provisions of this act shall be subject to the operation of the Preëmption Act of fourth September, eighteen hundred and forty-one, whether settled upon before or after the survey; and, in all cases where

the settlement was made before the survey, the settler shall file his declaration within three months after the survey is made and returned; and any person claiming a donation under this act shall be permitted to enter the land claimed by him at any time prior to the four years' occupancy and cultivation required, by paying therefor at the rate of one dollar and twenty-five cents per acre, and proving occupancy and cultivation up to the time of such payment.

SEC. 8. *And be it further enacted*, That it shall be the duty of the Surveyor-General, under such instructions as may be given by the Secretary of the Interior, to ascertain the origin, nature, character, and extent of all claims to lands under the laws, usages, and customs of Spain and Mexico; and, for this purpose, may issue notices, summons witnesses, administer oaths, and do and perform all other necessary acts in the premises. He shall make a full report on all such claims as originated before the cession of the territory to the United States by the treaty of Guadalupe Hidalgo, of eighteen hundred and forty-eight, denoting the various grades of title, with his decision as to the validity or invalidity of each of the same under the laws, usages, and customs of the country before its cession to the United States; and shall also make a report in regard to all pueblos existing in the Territory, showing the extent and locality of each, stating the number of inhabitants in the said pueblos, respectively, and the nature of their titles to the land. Such report to be made according to the form which may be prescribed by the Secretary of the Interior; which report shall be laid before Congress for such action thereon as may be deemed just and proper, with a view to confirm *bonâ fide* grants, and

give full effect to the treaty of eighteen hundred and forty-eight between the United States and Mexico; and, until the final action of Congress on such claims, all lands covered thereby shall be reserved from sale or other disposal by the government, and shall not be subject to the donations granted by the previous provisions of this act.

SEC. 9. *And be it further enacted,* That full power and authority are hereby given the Secretary of the Interior to issue all needful rules and regulations for fully carrying into effect the several provisions of this act.

SEC. 10. *And be it further enacted,* That the President of the United States shall be and he is hereby, authorized to appoint, by and with the advice and consent of the Senate, a Surveyor-General for the Territories of Nebraska and Kansas, who shall locate his office at such place as the President of the United States shall from time to time direct, and whose duties, powers, obligations and responsibilities and compensation shall be the same as those of the Surveyor-General of Wisconsin and Iowa, and who shall be allowed the same amount for office rent, fuel, incidental expenses, and clerk hire, as is allowed to said Surveyor-General of Wisconsin and Iowa.

SEC. 11. *And be it further enacted,* That said Surveyor-General shall cause the necessary surveys to be made in said Territories of standard meridian, base, and parallel lines, and of township and subdivisional lines, under such rules and regulations as shall be prescribed by the Commissioner of the General Land-Office.

SEC. 12. *And be it further enacted,* That all the lands to which the Indian title has been or shall be extinguished

within said Territories of Nebraska and Kansas, shall be subject to the operations of the Preëmption Act of fourth September, eighteen hundred and forty-one, and under the conditions, restrictions, and stipulations therein mentioned; *Provided, however,* That where unsurveyed lands are claimed by preëmption, notice of the specific tracts claimed shall be filed within three months after the survey has been made in the field, and on failure to file such notice or to pay for the tracts claimed before the day fixed for the public sale of the lands by the proclamation of the President of the United States, the parties claiming such lands shall forfeit all right thereto: *Provided,* said notices may be filed with the Surveyor-General, and to be noted by him on the township plats, until other arrangements shall have been made by law for that purpose.

SEC. 13. *And be it further enacted,* That the public lands in the Territory of Nebraska, to which the Indian title shall have been extinguished, shall constitute a new land district to be called the Omaha District; and the public lands in the Territory of Kansas, to which the Indian title shall have been extinguished, shall constitute a new land district, to be called the Pawnee District: the officers for each of which districts shall be established at such points as the president may deem expedient; and he is hereby authorized to appoint, by and with the advice and consent of the Senate, a Register and Receiver of Public Moneys for each of said districts, who shall each be required to reside at the site of their respective offices, and they shall have the same powers, perform the same duties, and be entitled to the same compensation as are or may be prescribed by law in relation to other land-offices

of the United States. And the President is hereby authorized to cause the surveyed lands to be exposed for sale from time to time, in the same manner and upon the same terms and conditions as the other public lands of the United States.

APPROVED, July 22, 1854.

SENATE.

36TH CONGRESS, 1st Session.) (REP. COM. No. 228.

IN THE SENATE OF THE UNITED STATES.

MAY 19, 1860. – Ordered to be printed.

Mr. BENJAMIN made the following

REPORT.

[To accompany Bill H. R. 195.]

The Committee on Private Land Claims, to whom were referred House bill No. 195 and various reports of the surveyor general of the Territory of New Mexico, in relation to private land claims in said Territory, have the honor to report:

That, after examination of the various claims mentioned in the letter of said surveyor general to the Commissioner of the General Land Office, dated the 12th of January, 1858, they concur in the recommendation of the said officer that the said claims should be confirmed, with two exceptions, which they now proceed to notice.

The claim of John Scolly and others, being No. 9 on said list, is recommended by the surveyor general for confirmation for twenty-five square leagues. A careful examination of this claim, the evidence given in support of it, and the report of the surveyor general, have failed to satisfy your committee that said claim is valid for more than five square leagues. The grant was for *"cinco leguas*

cuadradas," which your committee interpret as meaning five square leagues, and not five leagues square; and although the claimants were put in possession of five leagues square – that is, of twenty-five square leagues – yet this was done by a local magistrate only two years before the acquisition of the territory by the United States, and does not seem even to have been brought to the notice of, or to have been approved by, the superior authorities. The claim made is under a petition which originally prayed for *"diez leguas cuadradas;"* that is, for ten square leagues, and after various proceedings was *restricted,* according to the language of the petitioners themselves, to *"cinco leguas cuadradas."* The two expressions are identical in form, and if by *"cinco leguas cuadradas"* twenty-five square leagues were meant, then under the original petition the prayer for a grant of *"diez leguas cuadradas"* was a prayer for one hundred square leagues. This proposition is too extravagant for belief, and your committee therefore recommend that the confirmation of the claim of Scolly and others be restricted to five square leagues.

The second exception made by your committee is in relation to claim No. 17, which the surveyor general recommends in favor of Cornelio Vigil and Ceran St. Vrain for the full extent embraced in a survey annexed to the papers. The quantity of land embraced in this survey does not appear; but by a close examination of some of the distances shown, and a rough calculation of the others, there cannot well be less than one hundred square leagues, and possibly much more. Now, a reference to the petition and grant shows that the claimants, on the 8th December, 1843, petitioned Governor Armijo, stating that

they had "examined the land embraced within the Huerfano, Piripa, and Cucharas rivers to their junction with the Arkansas and Aminas rivers, and finding sufficient fertile land for cultivation, an abundance of pasture and water, &c., they pray you to *grant to each one of us a tract of land in the above-mentioned locality,* protesting that, in the coming spring, we will commence operations which will be continued *until the colony shall be established and settled,*" &c.

On the 9th December, 1843, the governor referred this petition "to the justice of the peace of the proper jurisdiction, who will *give the possession referred to by the petitioners,* as this government desires to encourage agriculture and the arts."

On the 25th December, 1843, the two claimants presented a petition to the justice of the peace, setting forth that the governor had granted them "*the public land contained in the accompanying petition,*" and asking the execution of his order.

Under these petitions and orders the two claimants were placed by the justice of the peace, on the 2d January, 1844, in possession; not each "of a tract of land in the above-mentioned locality," but were jointly put in possession of the whole district of country, including the lands on both banks of three tributaries of the Napeste or Arkansas river, from their mouths nearly to their sources, and without the slightest apparent warrant in the governor's order for so exorbitant a grant.

If this demarkation of boundaries by the justice of the peace had been afterwards brought to the notice of the governor, and approved by him, a grave question would

still remain as to his power to concede entire districts of country without the authorization of the provincial assembly or the Mexican Congress; but your committee find no proof in the paper of approval of this action by any officer superior to the justice of the peace, and as his power clearly could not go beyond the execution of the governor's orders, your committee cannot concur in the recommendation of the surveyor general that this grant be confirmed for the full extent claimed. It is, however, plain that these parties are entitled to have their title confirmed to some extent; and this involves the inquiry as to the true meaning of the words "a tract of land," claimed in the original petition.

Under the Mexican colonization law of 1824, and the regulations of 1828, the extreme quantity allowed to be granted by the governor to any colonist was eleven square leagues. In the absence of any other guide, your committee suggest that a restriction of the confirmation to an extent of eleven square leagues for each claimant would be the utmost they could fairly expect, and would be not only a fair but a liberal compliance with the obligation imposed on the good faith of the United States under the terms of the treaty of Guadalupe Hidalgo.

In relation to the proper location of these tracts, a difficulty would arise, resulting from the fact, ascertained by your committee, that a certain number of settlers, represented to be forty or fifty, have settled on tracts of land conceded to them by the above-mentioned grantees, in different parts of the tract set apart for them by the justice of the peace; so that, if the two tracts of eleven leagues each were located in any part of the district of country referred to, the location would necessarily

exclude some of these settlers, who have gone on to the land in good faith and ought not to be disturbed. This difficulty can only be avoided by surveying the tracts of these actual settlers, wherever found within the district, and deducting their area from the area of the two eleven league tracts, leaving the remainder only of these two tracts to be located in one body. To this mode of location the claimants, who were represented before your committee by Judge Watts, as their counsel, and one of whom, Ceran St. Vrain, was present in person, have given their consent; and the committee has made, therefore, proper provision in the bill.

The second report of the surveyor general of said Territory was communicated to the Senate by the Secretary of the Interior, by letter addressed to the Vice-President, under date of 3d February, 1860, and consists of an abstract marked Exhibit A, comprehending nineteen claims, numbered from twenty to thirty-eight, both inclusive.

The bundles of papers containing the copies of the titles, the evidence, and the report of the surveyor general on each claim separately, have been examined by the committee; and they concur fully in the reports of that officer, recommending the confirmation of all said claims, except that which is numbered twenty-six, in the name of Juan B. Vigil.

The surveyor general recommends the rejection of this last-mentioned claim, and your committee concur with him in the opinion that it ought not to be confirmed; but the claimants' appeal to Congress, which ought not, in the judgment of the committee, to take the decision of

the matter into its own hands, and refuse the claimants an opportunity of establishing their rights in a court of justice, if they can.

Amongst the claims embraced, however, in this second report, and recommended for confirmation, are two which cover the same tract of land, and are embraced in one number, to wit, No. 20.

To this tract the two claimants are: First. The heirs of Luis Maria Baca claim under a grant made by the provincial deputation of Durango to said Baca and *his seventeen sons* on the 29th May, 1821, which grant was ratified and confirmed on the – February, 1825, by the departmental assembly of New Mexico. This grant was in fee, and is a genuine and valid title. Second. The town of Las Begas or Las Vegas. This town claims under a grant made on the 25th March, 1835, to Juan de Dios Mase and twenty-seven others, by the territorial deputation, on a petition which represented the land to be *public land*, and the petitioners were put in possession. The land has been divided out, and several hundred families are located on it.

The surveyor general having none but ministerial duties to perform, has recommended the confirmation of both these titles, leaving to the respective claimants the right of adjusting their conflicting claims in the courts. But Congress has other duties imposed on it, and is bound to legislate in such manner as to prevent, if possible, so disastrous a result as the plunging of an entire settlement of families into litigation, at the imminent hazard of being turned out of their homes, or made to purchase a second time, from a private owner, lands for which they paid their government a full equivalent, in the

labor, risk, and exposure by which they have converted a wilderness, surrounded by hostile savages, into a civilized and thriving settlement; and this can be done with little loss or costs to the government.

The claimants under the title to Baca, also represented by Judge Watts as their counsel, have expressed a willingness to waive their older title in favor of the settlers, if allowed to enter an equivalent quantity of land elsewhere within the Territory; and your committee cannot doubt that Congress will cheerfully accept the proposal, which, indeed, would undoubtedly have been acceded to by Mexico if the Territory had remained hers, and to whose rights and duties the United States have succeeded.

The committee have therefore prepared an amendment to the House bill, by way of substitute, embracing the several provisions above referred to.

CHAP. CLXVII. – *An Act to confirm certain Private Land Claims in the Territory of New Mexico.*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the private land claims in the Territory of New Mexico, as recommended for confirmation by the surveyor-general of that Territory, and in his letter to the Commissioner of the General Land Office, of the twelfth of January, eighteen hundred and fifty eight, designated as numbers one, three, four, six, eight, nine, ten, twelve, fourteen, fifteen, sixteen, seventeen, and eighteen, and the claim of E. W. Eaton, not entered on the corrected list of numbers, but standing on the original docket and abstract returns of the surveyor-general as number sixteen, be, and they are hereby, confirmed: *Provided,* That the claim number nine, in the name of John Scolley and others, shall not be confirmed for more than five square leagues; and that the claim number seventeen, in the name of Cornelio Vigil and Ceran St. Vrain, shall not be confirmed for more than eleven square leagues to each of said claimants.

SEC. 2. *And be it further enacted,* That in surveying the claim of said John Scolly it shall be lawful for him to locate the five square leagues confirmed to him in a square body in any part of the tract of twenty-five square leagues claimed by him; and that in surveying the claims of said Cornelio Vigil and Ceran St. Vrain, the location shall be made as follows, namely: the survey shall first be made of all tracts occupied by actual settlers holding possession under titles or promises to settle, which have heretofore been given by said Vigil and St. Vrain, in the tracts claimed by them, and after deducting the area of all such tracts from the area embraced in twenty-two square

leagues, the remainder shall be located in two equal tracts, each of square form, in any part of the tract claimed by the said Vigil and St. Vrain selected by them; and it shall be the duty of the surveyor-general of New Mexico immediately to proceed to make the surveys and locations authorized and required by the terms of this section.

SEC. 3. *And be it further enacted,* That the private land claims in the Territory of New Mexico, as recommended for confirmation by said surveyor-general in his reports and abstract marked exhibit A, as communicated to Congress by the Secretary of the Interior in his letter dated the third of February eighteen hundred and sixty, and numbered from twenty to thirty-eight, both inclusive, be, and the same are hereby, confirmed, with the exception of the claim numbered twenty-six, in the name of Juan B. Vigil, which claim, numbered twenty-six, is not confirmed.

SEC. 4. *And be it further enacted,* That the foregoing confirmation shall only be construed as quit-claims or relinquishments, on the part of the United States, and shall not affect the adverse rights of any other person or persons whomsoever.

SEC. 5. *And be it further enacted,* That it shall or may be lawful for the said Juan B. Vigil or any person claiming title under him, to institute suit against the United States for the lands claimed and embraced in said claim number twenty-six, not confirmed under the provisions of the third section of this act; said suit to be instituted in the supreme court of the Territory of New Mexico, to be defended by the district-attorney of the United States for

said Territory, under the direction of the Attorney-General of the United States, with the right of appeal to either party from the decision of said supreme court to the Supreme Court of the United States, if such appeal be asked for within one year from the rendition of the judgment in said supreme court of the Territory of New Mexico, and not thereafter: *Provided* That if the suit authorized by this section be not instituted within two years from the passage of this act, the said claimants shall be presumed to have abandoned all right or title to the lands embraced in said claim number twenty-six, and said lands shall thenceforth be held and deemed to be public lands belonging to the United States: *And provided further,* That in the determination of the suit authorized to be instituted by the terms of this section, the courts shall be governed by the treaty of Guadalupe Hidalgo, the law of nations, the laws, usages, and customs of the government from which the claim is derived, the principles of equity, and the decisions of the Supreme Court of the United States, so far as they are applicable.

SEC. 6. *And be it further enacted,* That it shall be lawful for the heirs of Luis Maria Baca, who made claim to the said tract of land as is claimed by the town of Las Begas, to select instead of the land claimed by them, an equal quantity of vacant land, not mineral, in the Territory of New Mexico, to be located by them in square bodies, not exceeding five in number. And it shall be the duty of the surveyor-general of New Mexico, to make survey and location of the lands so selected by said heirs of Baca when there-unto required by them: *Provided, however,* That the right hereby granted to said heirs of Baca shall

continue in force during three years from the passage of this act, and no longer.

APPROVED, June 21, 1860.

CHAP. CXXIII. – *An Act to amend an Act entitled "An Act to confirm certain private Land Claims in the Territory of New Mexico."*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the sixth section of the act entitled "An act to confirm certain private land claims in the Territory of New Mexico," approved June twenty-first, eighteen hundred and sixty, be, and the same is hereby, so amended as to enable the heirs of Luis Maria Baca to raise and withdraw the selection and location of one of the square bodies of land confirmed to them by said act, heretofore located by said heirs on the Pecos River, adjoining the Fort Sumner reservation, and to select and re-locate the same, in the manner provided by said act, at any time before the twenty-first day of June, in the year eighteen hundred and sixty-five, upon any of the public lands, unoccupied and not mineral, within the limits of the Territory of New Mexico, as said limits were known and defined by law on the twenty-first day of June, in the year eighteen hundred and sixty; and upon such selection and re-location, the title to said square body of land, the same being the one fifth part of the private claim confirmed to said heirs as aforesaid, so selected and re-located, shall be, and is hereby, confirmed to the said heirs of the said Luis Maria Baca as fully and perfectly as if the same had been selected and located within three years from and after the approval of the act aforesaid.

SEC. 2. *And be it further enacted,* That upon such selection and relocation all right, title, and interest of the said heirs of Luis Maria Baca, of, in, and to the square body of land heretofore selected and located by them on the Pecos

River, adjoining the Fort Sumner reservation in New Mexico, is hereby divested and declare null and void, and the same shall revest in the government of the United States.

APPROVED, June 11, 1864.

Calendar No. 999

SENATE

101ST CONGRESS)
2d Session)

(REPORT
(101-538

BACA LOCATION NO. 1 LAND ACQUISITION AND STUDY ACT OF 1990

OCTOBER 18 (legislative day OCTOBER 2), 1990. – Ordered to be printed

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Mr. JOHNSON, from the Committee on Energy and Natural Resources, submitted the following

REPORT

[To accompany S. 2521]

The Committee on Energy and Natural Resources, to which was referred the bill (S. 2521) to exchange certain lands in the State of New Mexico and for other purposes, having considered the same, reports favorably thereon with an amendment and an amendment to the title and recommends that the bill as amended do pass.

The amendment is as follows:

1. Strike out all after the enacting clause and insert in lieu thereof the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Baca Location No. 1 Land Acquisition and Study Act of 1990".

SEC. 2. PURPOSES AND DEFINITIONS.

(a) PURPOSES. – The purposes of this Act are to –

(1) authorize the Secretary to acquire by purchase certain lands in the State of New Mexico to be added to the Santa Fe National Forest;

(2) compensate Dunigan Enterprises for costs incurred as a result of certain Federal actions; and

(3) provide for a study to determine possible Federal protection of certain lands in New Mexico known as "Baca Location No. 1".

(b) As used in this Act, the term –

(1) "Baca Location No. 1" means the land owned by Dunigan Enterprises located in the Jemez Mountains west of Los Alamos, New Mexico, in Sandoval and Rio Arriba counties and consisting of approximately 100,000 acres, as generally depicted on the map entitled "1510 – Sante Fe NF – S. 2521 Cochiti Land Exchange Act" and dated October, 1990;

(2) "Dunigan Enterprises" means Dunigan Enterprises, Inc., a Texas corporation, and BL&C Co. and BL&C Co. No. 2, Texas Partnerships; and

(3) "Secretary" means the Secretary of Agriculture.

SEC. 3. ACQUISITION

(a) IN GENERAL. – The Secretary is authorized to acquire by purchase with donated or appropriated funds the lands described in subsection (b). Upon acquiring the

lands, the Secretary shall include them within the Santa Fe National Forest and shall administer them accordingly.

(b) DESCRIPTION OF LANDS TO BE ACQUIRED. – The lands to be acquired pursuant to subsection (a) consist of two parcels totaling approximately 36 acres, and are more specifically described as follows:

(1) PARCEL 1. – Beginning at Mile Point No. 11 on the south boundary of Baca Location No. 1; thence westerly along the south boundary of Baca Location No. 1 to its intersection with the constructed centerline of Forest Development Road 133; thence on a continuation of the south boundary of Baca Location No. 1, 33 feet; thence on an approximate bearing of N. 26° E., about 720 feet as scaled from the Forest Service's topographic map of the area, to the south boundary of the easement for New Mexico State Highway No. 4; thence in an easterly direction along the State Highway easement to its intersection with the south boundary of Baca Location No. 1; thence westerly along the south boundary of Baca Location No. 1 to the point of beginning, being Mile Point No. 11, containing approximately 27 acres, and subject to confirmation by formal survey and acceptable legal description and record acreage.

(2) PARCEL 2. – Beginning at Mile Point No. 10 on the south boundary of Baca Location No. 1; thence in a westerly direction along the south boundary of Baca Location No. 1, 423 feet to a point on the west side of the East Fork of the Rio Jemez; thence N. 38° E., 660 feet; thence N. 86° E., 170 feet; thence S. 70° E., 364 feet to the south boundary of Baca Location No. 1 to the point of beginning, being Mile Point No. 10, containing

approximately 9 acres, and subject to confirmation by formal survey and acceptable legal description and record acreage.

SEC. 4. COMPENSATION.

(a) IN GENERAL. – The Secretary of the Treasury is authorized and directed, subject to the provisions of subsection (b), to pay a direct payment to Dunigan Enterprises not to exceed $1,633,527 out of any money in the Treasury not otherwise appropriated to compensate Dunigan Enterprises for costs incurred as a result of certain Federal actions involving a land exchange between the United States and Dunigan Enterprises in 1966.

(b) CERTIFICATION. – (1) The Secretary of the Treasury may make the payment described in subsection (a), only after the Secretary, acting through the Inspector General of the United States Department of Agriculture certifies that –

(A) the sum accurately reflects the damages incurred by Dunigan Enterprises resulting from the 1966 land exchange in New Mexico between the United States and Dunigan Enterprises;

(B) Dunigan Enterprises has executed a release of all claims relating to the real property known as the "Cochiti Properties", approximately 2,456.14 acres as described in the quitclaim deed to the Baca Land and Cattle Company, et al., on September 25, 1966, as recorded in Volume 21, pages 361-363 of the Sandoval County, New Mexico records; and

(C) Dunigan Enterprises has executed with the Department of Justice an appropriate joint stipulation for entry of an order of dismissal, with prejudice, of the pending litigation between Dunigan Enterprises and the United States, entitled *Dunigan Enterprises, Inc. et al. v. United States*, No. 506-88L, United States Claim Court.

(2)(A) In making the verification pursuant to paragraph (1), the Secretary shall consider costs incurred by Dunigan Enterprises as a result of the 1966 land exchange between the United States and Dunigan Enterprises, including but not limited to foregone proceeds on sales contracts, and reasonable expenses for travel, telephone calls, legal services and other miscellaneous costs.

(B) If the Secretary determines pursuant to the certification requirement required in paragraph (1) that Dunigan Enterprises has incurred damages of less than $1,633,527, then Dunigan Enterprises shall be paid such lesser amount pursuant to subsection (a).

SEC. 5. LAND OWNERSHIP ADJUSTMENT STUDY.

(a) IN GENERAL. – (1) The Secretary is authorized and directed to conduct a study of Baca Location No. 1 to address –

(A) the scenic, geologic, recreational, timber, mineral, grazing, and other multiple use attributes of Baca Location No. 1; and

(B) options for Federal acquisition of Baca Location No. 1, in whole or part, by purchase, donation, exchange, or otherwise, including the estimated cost of each option.

(2) The Secretary shall complete the study within 2 full fiscal years after the date funds are made available for the study.

(b) COOPERATION. – (1) The Secretary shall prepare the study required by subsection (a) in cooperation with the owner of Baca Location No. 1, interested Indian tribes, the National Park Service, the United States Fish and Wildlife Service, and other interested parties.

(2) This Act shall not be construed to authorize entry upon Baca Location No. 1 by any person without the express permission of the landowner, and the Secretary shall make prior arrangements with the landowner for satisfactory access to Baca Location No. 1 for the purposes of the study.

(c) TRANSMITTAL OF STUDY. – Upon the completion of the study referred to in subsection (a), the Secretary shall transmit the results of such study, along with any legislative recommendations to the Committee on Energy and Natural Resources of the United States Senate and the Committees on Interior and Insular Affairs and Agriculture of the United States House of Representatives.

SEC. 6. TECHNICAL CORRECTION.

Section 110(a)(2) of the San Juan Basin Wilderness Protection Act of 1984, Public Law 98-603 (98 Stat. 3159) is hereby amended to read as follows:

> "(2) The real property referred to in paragraph (1) is located in Lake Sumner State Park, in the State of New Mexico, and is more particularly described as follows:

"all portions of sections 28 and 33 in Township 5 North, Range 24 East, with an elevation of more than 4,280 feet above sea level. The acreage and legal description of such real property shall be determined by the Secretary, after consultation with Sumner Lake Corporation.".

SEC. 7. AUTHORIZATION OF APPROPRIATIONS.

There are authorized to be appropriated such sums as may be necessary to carry out this provisions of this Act.

2. Amend the title so as to read:

A bill to authorize the Secretary of Agriculture to acquire and study certain lands in the State of New Mexico, and for other purposes.

PURPOSE OF THE MEASURE

The purposes of S. 2521, as ordered reported, are to authorize the Secretary of Agriculture to acquire approximately 36 acres of land in New Mexico for inclusion in the Santa Fe National Forest, to direct the Secretary of the Treasury to compensate the Dunigan Enterprises corporation for damages incurred as a result of a 1966 land exchange between the company and the United States, and to direct the Secretary of Agriculture to study the Baca Location No. 1 lands in New Mexico to determine options for Federal acquisition.

Background and Need

In 1966, Dunigan Enterprises, Inc., a Texas-based corporation, entered into a land exchange at the request of the Forest Service, whereby Dunigan conveyed 970 acres for inclusion in the Santa Fe National Forest and received 2,456 acres of land located between Albuquerque and Santa Fe. The land received by Dunigan was part of the "La Majada" land grant. Dunigan received a quitclaim deed from the United States at the time of the conveyance.

In 1979, Dunigan sold 1,030 acres of the land it had received in the 1966 exchange to another corporation, Colony Materials, Inc. In 1982, the Pueblo of Santo Domingo claimed ownership of part of the land originally conveyed by the Forest Service to Dunigan, including 208 acres of the parcel conveyed by Dunigan to Colony Materials. In 1982, Colony was notified by the Department of the Interior that the 208 acre parcel was in fact owned by the Santo Domingo Pueblo.

Dunigan filed suit in 1984 in Federal district court seeking to quiet title. The court ruled that because Dunigan did not file its claim within the 12-year statute of limitation period required under Federal law (28 U.S.C. 2409a(f)), Dunigan's suit was dismissed.

In 1986, Dunigan settled with Colony Materials and the Santo Domingo Pueblo, which allowed Colony to keep 960 acres of the original 1,030. In addition, Dunigan forgave approximately $400,000 of the original purchase price. Pursuant to its claim, the Santo Domingo Pueblo acquired approximately 500 acres of the La Majada grant. Dunigan kept 950 acres, and retained the right to sue the

Federal Government. In August 1988, Dunigan filed suit against the United States, claiming damages of approximately $2 million.

S. 2521 would compensate Dunigan approximately $1.63 million for damages incurred as a result of the 1966 land exchange. In addition, the bill would authorize the Secretary of Agriculture to acquire approximately 36 acres of land owned by Dunigan for addition to the Santa Fe National Forest. The bill also directs the Secretary to study an approximately 100,000-acre area in New Mexico known as "Baca Location No. 1" to determine options for Federal acquisition.

Legislative History

S. 2521 was introduced by Senators Bingaman and Domenici on April 25, 1990. Companion legislation, H.R. 4630, introduced by Congressman Richardson, passed the House of Representatives on October 10, 1990. The Subcommittee on Public Lands, National Parks and Forests held a hearing on S. 2521 on July 27, 1990.

At the business meeting on September 26, 1990, the Senate Committee on Energy and Natural Resources ordered S. 2521, as amended, favorably reported.

Committee Recommendations and Tabulation of Votes

The Senate Committee on Energy and Natural Resources, in open business session on September 26, 1990, by an unanimous vote of a quorum present, recommends that the Senate pass S. 2521, if amended as described herein.

The roll call vote on reporting the measure was 18 yeas, 0 nays, and 1 present, as follows:

YEAS	NAYS	PRESENT
Mr. Johnston		Mr. Domenici
Mr. Bumpers		
Mr. Ford		
Mr. Bradley		
Mr. Bingaman*		
Mr. Wirth*		
Mr. Conrad		
Mr. Heflin*		
Mr. Rockefeller		
Mr. Akaka*		
Mr. McClure		
Mr. Hatfield*		
Mr. Wallop		
Mr. Murkowski		
Mr. Nickles*		
Mr. Burns		
Mr. Garn*		
Mr. McConnell*		

*Indicates voted by proxy.

Committee Amendment

During the consideration of S. 2521, the Committee adopted an amendment in the nature of a substitute. As introduced, S. 2521 authorized a land exchange between Dunigan Enterprises and the United States, provided for a direct payment of cash to Dunigan in compensation for damages resulting from the 1966 land exchange, and authorized a study of the Baca Location No. 1 property. The Committee amendment deletes the land exchange provisions, but retains the cash payment to Dunigan and study of the Baca Location No. 1. The amendment also

makes numerous technical, clarifying and conforming changes. The amendment is described in detail in the Section-by-Section Analysis below.

The Committee also adopted an amendment to the title.

Section-by-Section Analysis

Section 1 entitles the Act, the "Baca Location No. 1 Land Acquisition and Study Act of 1990."

Section 2 sets forth the purposes of the Act and defines certain terms used in the Act.

Section 3(a) authorizes the Secretary of Agriculture (the "Secretary") to purchase approximately 36 acres in New Mexico for addition to the Santa Fe National Forest.

Subsection (b) defines the lands to be acquired. The two parcels, which are owned by Dunigan Enterprises, Inc. ("Dunigan"), are located near the southern boundary of the Baca Location No. 1 property.

Section 4(a) authorizes and directs the Secretary of the Treasury, subject to the provisions of subsection (b), to pay a sum of money not to exceed $1,633,527 to Dunigan, to compensate Dunigan for damages incurred as a result of a 1966 land exchange with the Forest Service.

Subsection (b) provides that the Secretary of the Treasury may only make the payment to Dunigan after the Inspector General of the Department of Agriculture certifies that the sum to be paid accurately reflects the damages incurred by Dunigan as a result of the 1966 land exchange. The Inspector General must also certify that

Dunigan has executed a release of all claims relating to the 2,456 acre parcel known as the "Cochiti properties," and that Dunigan has executed a joint stipulation with the Department of Justice of an order of dismissal, with prejudice, of the pending litigation between the United States and Dunigan.

Subparagraph (2)(A) of the subsection sets forth the criteria the Inspector General is to consider in making the determination whether the amount to be paid to Dunigan is appropriate.

Subparagraph (2)(B) of the subsection states that if a lower sum is established as the correct amount of compensation pursuant to the certification process, then Dunigan is to be paid that lesser amount.

Section 5(a) authorizes and directs the Secretary to conduct a study of the approximately 100,000-acre Baca Location No. 1 property to assess the various resources located on the property and to address options for Federal acquisition of the property, in whole or part, by purchase, donation, exchange, or otherwise. The study is to be completed within 2 full fiscal years after the date funds are made available for the study.

Subsection (b) provides that the Secretary is to prepare the study in cooperation with the owner of Baca Location No. 1 (currently owned by Dunigan), interested Indian tribes, the National Park Service, the U.S. Fish and Wildlife Service, and other interested parties. The subsection clarifies that the Act does not provide any authorized entry on to the property except with the express permission of the landowner.

Subsection (c) states that upon the completion of the study, the Secretary is to transmit the results of the study, along with any legislative recommendations, to the Senate Committee on Energy and Natural Resources and the House Committee on Interior and Insular Affairs.

Section 6 makes a technical correction to the San Juan Basin Wilderness Protection Act of 1984. The amendment corrects the legal description of land in New Mexico that the Secretary of the Interior is authorized to convey to the Sumner Lake Corporation of the State of New Mexico.

Section 7 authorizes the appropriation of such sums as may be necessary to carry out the provisions of this Act.

Cost and Budgetary Consideration

The Congressional Budget Office estimate of the costs of this measure has been requested but was not received at the time the report was filed. When the report is available, the Chairman will request it to be printed in the Congressional Record for the advice of the Senate.

Regulatory Impact Evaluation

In compliance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee makes the following evaluation of the regulatory impact which would be incurred in carrying out S. 2521. The bill is not a regulatory measure in the sense of imposing Government-established standards or significant economic responsibilities on private individuals and businesses.

No personal information would be collected in administering the program. Therefore, there would be no impact on personal privacy.

Little, if any, additional paperwork would result from the enactment of S. 2521, as ordered reported.

Executive Communications

On July 17, 1990, the Committee on Energy and Natural Resources requested legislative reports from the Department of Agriculture and the Office of Management and Budget setting forth executive views on S. 2521. On July 24, 1990, the Committee also requested reports from the Department of Justice. These reports had not been received at the time the report on S. 2521 was filed. When the reports become available, the Chairman will request that they be printed in the Congressional Record for the advice of the Senate. The testimony provided by the Forest Service at the Subcommittee hearing follows:

Statement of Jeff M. Sirmon, Deputy Chief, Forest Service, U.S. Department of Agriculture

Mr. Chairman and members of the Subcommittee: Thank you for the opportunity to offer the Department of Agriculture's views on S. 2521, the "Cochiti Land Exchange Act of 1990," and S. 2527, the "Enchanted National Forest Information and Education Study Act of 1990."

The Department of Agriculture supports the purposes of S. 2521, but we suggest some technical and clarifying amendents. We support enactment of S. 2527.

While both bills deal with National Forest management in New Mexico, the objectives of each bill are different. Therefore, I will briefly address each bill separately and then will be happy to answer questions.

S.2521, THE "COCHITI LAND EXCHANGE ACT OF 1990"

S. 2521 provides for a land exchange in which the United States would receive 36 acres of private land owned by Dunigan Enterprises in exchange for 1,700 acres of National Forest lands in Sandoval County, New Mexico. In addition, the United States would make a cash payment of approximately $1.1 million to Dunigan Enterprises. The lands received by the United States would be added to the Santa Fe National Forest.

The bill also provides for a cooperative land ownership adjustment study with the owners of Baca Location No. 1 (originally a large Spanish land grant) to address its multiple use attributes and to address options for its possible acquisition by the United States.

Baca Location No. 1 includes approximately 100,000 acres located within, and virtually surrounded by, the Santa Fe National Forest. It was the desire of Mr. Dunigan, now deceased, that the land grant be transferred to public ownership, rather than remain in private ownership and be subject to development. The area is very scenic and has outstanding wildlife and public recreation values. Therefore, we support the cooperative land ownership study. We suggest, however, that Section 7 be amended to remove part (c), which states that the study will not require an environmental impact statement. The

NEPA analysis required to develop an action proposal is best determined after review of the pertinent issues, environmental impacts and public input.

S. 2521 would also resolve a land title problem stemming from a 1966 land exchange between Dunigan Enterprises and the United States. Details regarding the title problem are included in the Supplemental Statement attached to my written statement.

As currently described in S 2521, the land exchange is unequal in appraised value in favor of Dunigan Enterprises. The difference in the appraised value, along with the cash payment provided, would allow Dunigan Enterprises to recover its costs from a clouded title associated with the 1966 exchange. The conveyance of certain National Forest land is part of the compensation package proposed by S. 2521.

We agree that Dunigan Enterprises should be reasonably compensated for its costs. However, we feel that the compensation should be provided entirely in a cash payment. Compensation which provides National Forest land in lieu of cash would set an undesirable precedent which could lead to National Forest lands being used as compensation in future claims against the United States.

Therefore, we suggest that the legislation be amended to provided compensation to Dunigan Enterprises entirely in cash (rather than partially in cash and partially in land). This would increase the cash payment to Dunigan Enterprises provided in Section 4 of S. 2521 and would decrease the National Forest land

involved in the land exchange described in Sections 2 and 3. If these suggested revisions are acceptable, the Forest Service will provide new land description and other pertinent information after discussions with representatives of Dunigan Enterprises.

We estimate that enactment of S. 2521 would result in a Federal cost of $1.3 million. Most of this cost ($1.1 million) in the cash payment to Dunigan Enterprises. The remaining $200,000 would be needed by the Forest Service over the FY 91-93 period to complete the land ownership adjustment study. We have not validated the cash compensation of $1.1 million in Section 4, so can offer no opinion on the amount. If the $1.1 million compensation figure is correct, the total cost of the bill, after including the suggested amendments, is estimated at $1.9 million. In the amended bill, the cost of the landownership adjustment study would remain at $200,000, but the cash compensation cost would increase.

This completes my comments on S. 2521.

HOUSE OF REPRESENTATIVES

101ST CONGRESS)) REPT. 101-783
2d Session)) Part 1

EXCHANGING CERTAIN LANDS IN THE STATE OF NEW MEXICO, AND FOR OTHER PURPOSES

OCTOBER 1, 1990. – Ordered to be printed

Mr. UDALL, from the Committee on Interior and Insular Affairs, submitted the following

REPORT

[To accompany H.R. 4630]

[Including cost estimate of the Congressional Budget Office]

The Committee on Interior and Insular Affairs, to whom was referred the bill (H.R. 4630) which on April 25, 1990 was referred jointly to the Committees on Interior and Insular Affairs and Agriculture, to exchange certain lands in the State of New Mexico, and for other purposes, having considered the same, report favorably thereon with amendments and recommend that the bill as amended do pass.

The amendments are as follows:

Page 1, line 3, strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Baca Location Number One Act of 1990".

SEC. 2. PURPOSES AND DEFINITIONS.

(a) PURPOSES. – The purposes of this Act are –

(1) to authorize the Secretary to acquire by purchase, donation, or exchange certain lands in the State of New Mexico to be added to the Santa Fe National Forest.

(2) to compensate Dunigan Enterprises for costs incurred as a result of Federal actions; and

(3) to provide for a study of the possible Federal protection of certain lands in New Mexico.

(b) DEFINITIONS. – For the purposes of this Act:

(1) The term "Dunigan Enterprises" means Dunigan Enterprises, Incorporated, a Texas corporation, and BL&C and BL&C Co. No. 2, Texas partnerships.

(2) The term "Secretary" means the Secretary of Agriculture.

SEC. 3. LAND ACQUISITIONS.

(a) The Secretary is authorized to acquire through purchase, donation or exchange the lands described in subsection (b) which total approximately 36 acres. The lands shall become part of the Santa Fe National Forest and shall be administered by the Secretary pursuant to laws applicable to the Santa Fe National Forest. Such

sums as may be necessary to acquire these lands are authorized to be appropriated.

(b) DESCRIPTION OF LANDS. – New Mexico Principal Meridian, Sandoval County Township 19 North, Range 3 East: The portions of the Spanish land grant surveyed and known as Baca Location No. 1 described as follows:

(1) PARCEL 1. – Beginning at Mile Point No. 11 on the south boundary for Baca Location No. 1; thence westerly along the south boundary of Baca Location No. 1 to its intersection with the constructed centerline of Forest Development Road 133; thence on a continuation of the south boundary of Baca Location No. 1, 33 feet; thence on an approximate bearing of N. 26° E., about 720 feet as scaled from the Forest Service's topographic map of the area, to the south boundary of the easement for New Mexico State Highway No. 4; thence in an easterly direction along the State highway easement to its intersection with the south boundary of Baca Location No. 1; thence westerly along the south boundary of Baca Location No. 1 to the point of beginning, being Mile Point No. 11, containing about 27 acres, subject to confirmation by formal survey and acceptable plat required to provide an acceptable legal description and record acreage.

(2) PARCEL 2. – Beginning at Mile Point No. 10 of the south boundary of Baca Location No. 1; thence in a westerly direction along the south boundary of Baca Location No. 1, 423 feet to a point on the west side of the east fork of the Rio Jemez; thence N. 38° E., 660 feet; thence N. 86° E., 170 feet; thence S. 70° E., 477 feet; thence S. 34° E., 364 feet to the south boundary of Baca

Location No. 1; thence along the south boundary of Baca Location No. 1 to the point of beginning, being Mile Point No. 10, containing approximately 9 acres, subject to confirmation by formal survey and acceptable plat required to provide an acceptable legal description and record acreage.

SEC. 4. COMPENSATION.

There shall be paid to Dunigan Enterprises a direct payment by the Secretary of the Treasury of not more than $1,634,000 out of any money in the Treasury not otherwise appropriated to compensate the company for costs it incurred as a result of Federal action affecting the title to 2,456 acres of land it received from the United States in 1966 in a land exchange. This sum shall be paid to Dunigan Enterprises only if the Secretary through the Inspector General of the U.S. Department of Agriculture has verified that $1,623,527 accurately reflects damages incurred by Dunigan Enterprises. In making this verification, the Secretary shall consider costs the company incurred as a result of the aforementioned actions for lost land; forgone proceeds on sales contracts; and expenses for travel, telephone calls and legal activities; and the miscellaneous costs. If the Secretary determines that the sum of the damages incurred is less than $1,633,527, Dunigan Enterprises shall be paid the lesser amount.

SEC. 5. LAND OWNERSHIP ADJUSTMENT STUDY.

(a) STUDY. – The Secretary shall conduct a study of Baca Location No. 1 to address –

(1) the scenic, geologic, recreational, timber, mineral, grazing, and other multiple use attributes of Baca Location No. 1; and

(2) options for acquisition of Baca Location No. 1 by the United States, in whole or part, by purchase, exchange, donation, or otherwise, including the estimated cost of each option:

(b) COOPERATION. – (1) The study required by subsection (a) shall be conducted by the Secretary, in cooperation with the owners of Baca Location No. 1, the National Park Service, the United States Fish and Wildlife Service, Native Americans, other interested parties, and the general public.

(2) This Act does not authorize entry upon Baca Location No. 1 by any person without the express permission of the landowner, and the Secretary shall make prior arrangements with the landowner for satisfactory access to the land for purposes of this section.

(c) REPORT. – The Secretary shall report the results of the study required by subsection (a) and any recommendations for legislation not later than 3 full fiscal years after the date of enactment of this Act to the Committee on Interior and Insular Affairs of the United States House of Representatives and to the Committee on Energy and Natural Resources of the Senate.

(d) AUTHORIZATION OF APPROPRIATIONS. – There are authorized to be appropriated such funds as are necessary for the study required by subsection (a).

SEC. 6. TECHNICAL CORRECTION.

Section 110(a)(2) of the San Juan Basin Wilderness Protection Act of 1984, Public Law 98-603, 98 Stat. 3159, is amended to read as follows:

> "(2) The real property referred to in paragraph (1) is located in Lake Sumner State Park, in the State of New Mexico, and is more particularly described as follows: all portions of sections 28 and 33 in township 5 north, range 24 east, that are more than 4,280 feet above sea level. The acreage and legal description of such real property shall be determined by the Secretary after consulting with Sumner Lake Corporation."

Amend the title to read as follows:

To acquire and study certain lands in the State of New Mexico, and for other purposes.

PURPOSE

The purpose of H.R.4630[1] is to compensate Dunigan Enterprises for losses it incurred through actions of the Federal Government, to study the Baca Location Number 1 for acquisition by the Federal Government, and to authorize the Secretary of Agriculture to acquire 36 acres to be made part of the Santa Fe National Forest.

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[1] H.R. 4630 was introduced by Mr. Richardson on April 25, 1990.

Background

H.R. 4630 affects a large parcel of land known as the Baca Location Number 1. Originally, a large Spanish land grant, it includes 100,000 acres owned by Dunigan Enterprises and is surrounded by the Santa Fe National Forest. It contains outstanding wildlife, recreation, scenic, geologic, and cultural resources and has great potential to be added to the Santa Fe National Forest.

In 1966, the United States received 969 acres of the Baca Location from Dunigan Enterprises in exchange for 2,456 acres of National Forest land adjacent to the Santa Domingo Pueblo. Several years after the exchange, the Pueblo made a native American claim on the former national forest lands that had transferred to Dunigan. The Department of the Interior supported the Pueblo's claim. In order to clear title on their new lands, Dunigan, through a negotiated settlement, was required to give the Pueblo 557 acres of the 2,456 acre parcel and paid substantial court costs and legal fees. Since the statute of limitations has expired, legislation is the only remedy for Dunigan Enterprises to recover the costs it incurred through these federal actions which were not brought about through any fault of the company.

Section-by-Section Analysis

Section 1 designates a short title: "Baca Location Number One Study Act of 1990."

Section 2 states three purposes for the bill; to authorize the Secretary of Agriculture to acquire 36 acres of the Baca Location Number One, to compensate Dunigan

Enterprises for the losses it incurred as a result of the 1966 land exchange with the Santa Fe National Forest, and to establish a study of the potential for the Federal government to acquire the Baca Location Number One to give it protection. The Committee understands that the land is valued between $200,000 and $600,000. The section also defines "Secretary" and "Dunigan Enterprises".

Section 3 authorizes the Secretary of Agriculture to acquire 36 acres of the Baca Location Number One through purchase, donation or exchange. It contains a legal description of the lands and designates them part of the Santa Fe National Forest once they are acquired.

Section 4 directs the Secretary of the Treasury to give Dunigan Enterprises a direct payment from any money in the Treasury not otherwise appropriated to compensate the company for costs it incurred as a result of the federal action that affected its title to 2,456 acres of land it has received from the United States in a land exchange in 1966. The amount of the payment must be determined by the Secretary of Agriculture through the Inspector General of the U.S. Department of Agriculture and can be no more than $1,634,000. In making this determination, the Secretary must consider costs the company incurred for the lost land, forgone proceeds on sales contracts, travel expenses, telephone calls, legal activities and miscellaneous costs.

Section 8 has four subsections:

Subsection (a) directs the Secretary of Agriculture to study the Baca Location Number One. The study will include the scenic, geologic, recreational, timber, mineral, grazing and other multiple use attributes of the tract;

options on how the United States could acquire the tract; and the cost of each option.

Subsection (b) directs the Secretary of Agriculture to conduct the study in cooperation with the owners of the land, the National Park Service, the U.S. Fish and Wildlife Service, other interested parties and the general public. It further directs the Secretary to make arrangements with the landowner to access the tract before conducting the study. It specifically does not authorize entry into the Baca Location Number One without permission of the landowner.

Subsection (c) directs the Secretary of Agriculture to report the results of the study and any recommendations for legislation to the appropriate Committee of Congress within three fiscal years after enactment.

Subsection (d) authorizes funds to be appropriated for the study.

Section 9 makes a technical correction in a land description in Section 110 (a)(2) of the San Juan Basin Wilderness Protection Act of 1984. This provision is identical to H.R. 5215, introduced by Representatives Schiff, Richardson and Skeen.

Legislative History and Committee Recommendations

H.R. 4630 was referred to the Committee on Interior and Insular Affairs on April 25, 1990. The Subcommittee on National Parks and Public Lands held a hearing on the bill on September 10. On September 11, the Subcommittee adopted an amendment in the nature of a substitute and

favorably reported the bill, as amended, to the Full Committee. On September 19, the Committee on Interior and Insular Affairs adopted the substitute, with amendments, and favorably reported the bill, as amended, to the House by voice vote.

Inflationary Impact Statement and Budget Act Compliance

Taken in context of the overall budget, the funding involved is insignificant and the Committee believes no inflationary impact will result from the enactment of this legislation. The analysis of the Congressional Budget Office, which the Committee adopts as its own, follows:

U.S. Congress,
Congressional Budget Office,
Washington, DC, September 27, 1990.

Hon. Morris K, Udall,

Chairman, Committee on Interior and Insular Affairs, House of Representatives, Washington, DC.

Dear Mr. Chairman: The Congressional Budget Office has prepared the attached cost estimate for H.R. 4630, the Cochiti Land Exchange Act of 1990.

If you wish further details on this estimate, we will be pleased to provide them.

Sincerely,

Robert D. Reischauer,
Director.

CONGRESSIONAL BUDGET OFFICE – COST ESTIMATE

1. Bill number: H.R. 4630.

2. Bill title: The Cochiti Land Exchange Act of 1990.

3. Bill status: As ordered by the House Committee on Interior and Insular Affairs on September 19, 1990.

4. Bill purpose: H.R. 4630 would authorize the Department of Agriculture (USDA) to purchase 36 acres of land in New Mexico to be added to the Santa Fe National Forest. USDA also would be directed to conduct a land acquisition study of a specified parcel of land in New Mexico.

H.R. 4630 also would direct the Secretary of the Treasury to pay a private landholder (Dunigan Enterprises) in New Mexico up to $1.6 million in compensation for certain costs the landholder incurred as a result of past federal actions.

5. Estimated costs to the Federal Government:

[By Fiscal year, in millions of dollars]

	1991	1992	1993	1994	1995
Direct spending:					
Estimated budget authority	(1)				
Estimated outlays	(1)				
Authorizations:					
Estimated authorization level	.5				
Estimated outlays	.3	0.1	0.1		

[1]The payment to Dunigan Enterprises cannot be precisely estimated at this time. Information from USDA indicates that the payment is likely to be between $1 million and $1.6 million. The precise amount will depend on further verification by USDA of the damages incurred by Dunigan Enterprises.

The costs of this bill fall in budget function 300.

Basis of estimate: For purposes of preparing this estimate, CBO assumed that H.R. 4630 would be enacted early in fiscal year 1991 and that the amounts estimated to be needed to carry out the land purchase ($0.3 million) and study activities ($0.3 million) will be provided by the middle of that year. Outlays were estimated based on information provided by USDA. We assume that upon enactment of the bill, the Treasury Department will make a direct payment to Dunigan Enterprises.

6. Estimated costs to State and local governments: None.

7. Estimate comparison: None.

8. Previous estimate: None.

9. Estimate prepared by: Theresa Gullo.

10. Estimate approved by: C.G. Nuckols, for James L. Blum, Assistant Director for Budget Analysis.

Oversight Statement

The Committee intends to carefully monitor the implementation of this legislation to assure compliance with the intent of the Act. No recommendations were submitted to the Committee pursuant to rule X, clause 2.

Supreme Court, U.S.
FILED

94 390 SEP - 1 1994

No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1994

AMERICAN WATER DEVELOPMENT, INC.,
a Colorado corporation,

Petitioner,

v.

CITY OF ALAMOSA, et al.,

Respondents.

Petition For Writ Of Certiorari
To The Colorado Supreme Court

APPENDIX TO PETITION FOR WRIT OF CERTIORARI
VOLUME II
(Pages A-270 through A-380)

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115 pp

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DISTRICT COURT, WATER DIVISION 3, COLORADO

Case No. 86CW46

AFFIDAVIT OF MICHAEL C. MEYER

CONCERNING THE APPLICATION FOR WATER RIGHTS OF AMERICAN WATER DEVELOPMENT, INC., THE BACA RANCH COMPANY, AND THE BACA CORPORATION

IN SAGUACHE COUNTY

STATE OF ARIZONA)
) ss.
COUNTY OF)

Michael C. Meyer, Affiant herein, being first duly sworn and under oath, deposes and states:

1. I am a Professor of History at the University of Arizona with the education, training, and experience set forth in the attached Curriculum Vita.

2. I researched and prepared a report entitled "The Hispanization of Southern Colorado," a copy of which is attached hereto and incorporated herein by this reference.

3. I have personal knowledge of the information contained in that report, and the facts and data contained therein are of a type reasonably and regularly relied upon by expert historians in forming opinions or inferences on the subject.

4. If called to testify concerning local law and custom in the San Luis Valley, my testimony would be substantially the same as that contained in the report.

5. Further, Affiant deposes and states that he has read the statements made herein, knows the contents thereof, and that the same are true to the best of his knowledge, information, and belief.

/s/ Michael C. Meyer
Michael C. Meyer

STATE OF ARIZONA)
) ss.
COUNTY OF PIMA)

SUBSCRIBED AND SWORN to before me this 14th day of May, 1990, by Michael C. Meyer.

/s/ Illegible
Notary Public

Address: /s/ Tucson,
Pima County
Arizona

My commission expires:

July 4, 1991

MICHAEL C. MEYER
CURRICULUM VITA

ADDRESS

5400 North Suncrest Place

Tucson, Arizona 85718

Telephone: (602) 299-1106 (Home); (602) 621-7106 (Office)

PERSONAL DATA

Born in Albuquerque, New Mexico, September 6, 1935

Service: United States Army (Japan), 1958-1960

Married: with three children

ACADEMIC BACKGROUND

B.A. University of New Mexico, 1957

M.A. University of New Mexico, 1961

Ph. D. University of New Mexico, 1963

PROFESSIONAL SOCIETIES

American Historical Association

Historical Society of New Mexico

Latin American Studies Association

Rocky Mountain Council of Latin American Studies (President, 1976)

American Association of University Professors Conference on Latin American History (President, 1985)
Southwestern Social Science Association Committee

on Mexican Studies, CLAH (President, 1971) Midwest Association of Latin American Studies PROFMEX, A Consortium of U.S. Research Programs for Mexico (President, 1978-1980)

TEACHING EXPERIENCE

Visiting Assistant Professor, University of New Mexico, 1963

Instructor, University of Nebraska, 1963-1964

Assistant Professor, University of Nebraska, 1964-1966

Associate Professor, University of Nebraska, 1967-1970

Professor, University of Nebraska, 1970-1973

Professor, University of Arizona, 1973-Present Investigator Visitante, Instituto de Investigaciones Historicas, Universidad Nacional Autnóma de México, 1980

THE HISPANIZATION OF SOUTHERN COLORADO

Michael C. Meyer

The centennial history of the state of Colorado, written by Professors Carl Abbott, Stephen J. Leonard, and David McComb, and published by the Colorado Associated University Press, aptly captures the cultural essence of the southern portion of the state when it labels that

region, "Hispanic Colorado."[1] Although the historiography of southern Colorado is yet to be completed, there is ample justification for such a designation.

After the conquest of central Mexico by Hernán Cortés in the early sixteenth century the Spanish crown initiated a carefully orchestrated policy of extending the boundaries of that new American colony to the north. It was a movement every bit as dramatic and every bit as significant as the later westward expansion of the United States. In the centuries following the defeat of the Aztec empire, Southern Colorado proved to be the northern limit Spanish expansion in the New World. It first became the far northern frontier of the Viceroyalty of New Spain and was governed by decrees issued by the Spanish crown, laws passed by the Royal Council of the Indies and local legislation enacted by Provincial governors and local town councils;[2] after Mexican independence from Spain in 1821 it became the northern boundary of the Mexican Republic and was subject to general laws of the Mexican Republic and to a series of Mexican constitutions promulgated in 1824, 1836, and 1843;[3] at the conclusion of

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[1] Carl Abbott, Stephen J. Leonard and David McComb, *Colorado: A History of the Centennial State* Rev. ed. (Boulder: Colorado Associated University Press, 1982), p. 42.

[2] A major codification of the Spanish laws governing the Possessions in the New world was published in four volumes in 1680. A facsimile edition of this monumental endeavor is now available. *Recopilación de leyes de los reynos de las Indias* (4 vols., Madrid: Cultura Hispanica, 1973).

[3] Mexico's constitutional evolution can be traced in Felipe Tena Ramírez (ed.), *Leves Fundamentales de México, 1808-1957* (Mexico City: Editorial Porrua, S.A., 1957).

the war between the United States and Mexico in the middle of the nineteenth century it fell within the territorial confines of Hispanic New Mexico and was covered by the Organic Act and subsequent laws of that new territory; and it was subsequently moved to the Colorado territory when that entity was formed in 1861 and was governed by the provisions of that Organic Act as well as the laws and statutes enacted by the Colorado Territorial Assembly.

Early Spanish Expeditions into Colorado

There is no conclusive evidence that the sixteenth century Spanish explorers ever set foot in what is today the state of Colorado. Francisco Vásquez de Coronado, Antonio Rodríguez, Antonio de Espejo and Juan de Oñate, all major contributors to the foundation of Spanish New Mexico, moved close but probably never walked on Colorado soil. Their successors most assuredly did and, in the process, set in motion the long process of the Hispanization of this region.[4]

The Spanish Penetration of southern Colorado was part of a system of pushing back the northern frontier by the process of defensive expansion, a mechanism tried and tested earlier in other parts of the Viceroyalty of New Spain. Initially there were far too few Spanish colonists to establish outposts everywhere in the north but periodic

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[4] The best general description of the early Spanish entries into Colorado remains Alfred B. Thomas, "Spanish Expeditions Into Colorado," *The Colorado Magazine* 1 (November, 1924), pp. 289-300. This article was based on the primary documentation found in Herbert Eugene Bolton's private collection.

military expeditions could reconnoitre, take formal possession in the name of the Spanish crown, and exert a sufficient presence to secure the territory in question from hostile Indians or foreign interlopers.

The first recorded European *entrada* into Colorado occurred in the middle of the seventeenth century, probably 1664, when some twenty Spanish soldiers, and a small force of Pueblo Indian allies, under the command of Juan de Archuleta were sent north from the presidio at Santa Fe to capture some runaway Taos Indians. They moved into southeastern Colorado and found and recaptured their runaways at camp called El Cuartelejo northeast of present day Las Animas. Although this first expedition was little more than a footnote in Colorado history the Spaniards had expanded their geographic horizons and had recognized the desirability of securing the region at some time in the future.

In 1680 the Pueblo Indians of New Mexico's Rio Grande Valley rose up in a massive rebellion and drove the Spaniards completely out of the New Mexican province. It took the Spaniards twelve years to recapture the territory and when the conquest was ultimately effected by Diego de Vargas in 1692 it was amply clear that the southern Colorado frontier had to be more tightly secured. Not only did the region house runaway Pueblo Indians but other Indians, Apaches, Comanches, Utes and Pawnees conducted raids on northern New Mexican outposts and then utilized southern Colorado as a safe refuge. Moreover, by the end of the seventeenth century French and English explorers had begun to threaten the

integrity of northern New Spain.[5] The Spanish response came at the beginning of the eighteenth century.

In 1706, on the orders of New Mexico governor Francisco Cuervo de Valdez, Juan de Ulibarrí led forty Spanish soldiers and a hundred Pueblo Indian auxiliaries northeastward from Taos again to capture runaway New Mexico Indians from Picuris Pueblo.[6] He found his runaways once again at Cuartelejo but, more importantly, he was informed that Spain's French rivals were arming Pawnee Indians for attacks on Spanish outposts. The Ulibarri expedition was far more important than Juan de Archuleta a half a century earlier. On August 2, 1706, seventy years before the United States Declaration of Independence, this Spanish commander took formal possession of southern Colorado in the name of the Spanish King. In his act of possession he used essentially the same words that other Spanish commanders had used in hundreds of other sites from the southern tip of South America to the northern reaches of New Spain: "Knights, Companions, and Friends: Let the Broad new province of San Luis, the great settlement of Santo Domingo of El Cuartelejo be pacified by the arms of us who are vassals of our monarch, king and natural lord, Don Philip V, may

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[5] The international rivalry can be traced in James H. Baker and LeRoy R. Hafen, *History of Colorado* (3 vols. Denver: Linderman Co., Inc., 1927), I, 263-273. This three-volume history was prepared under the supervision of the State Historical and Natural History Society of Colorado. See also Junius Henderson, et al., *Colorado: Short Studies of its Past and Present* (Boulder: University of Colorado Press, 1927), pp. 45-52.

[6] The name of the leader of this expedition is sometimes rendered as Uribarri.

he live forever."[7] From the legal point of view southern Colorado was now a Spanish territory just as Argentina, Peru, Guatemala, or Mexico.

Securing southern Colorado was deemed of sufficient importance that a new Governor of New Mexico, Don Antonio Valverde Cosío, led an expedition of 700 men into the region in 1719 and subsequently sent Pedro de Villasur on a follow-up expedition the next year. Other Spanish entradas followed on their heels. By the middle of the eighteenth century Indians and foreigners alike were not surprised to encounter Spanish troops south of the Arkansas River. With northern New Mexico outposts as their base of operations, Spanish armies and explorers crisscrossed the region, mapped it, named its topographical features and opened the trails that others would later use.[8]

Defensive expansion worked in southern Colorado. The Comanche proved more intractable than other Indian tribes or Spain's European rivals but they were ultimately defeated by Spain's famous Indian fighter Captain Juan Bautista de Anza who moved through the San Luis Valley with 600 mounted soldiers in 1779, killed Comanche Chief Cuerno Verde, and routed his forces in the hill country between present day Pueblo and Walsenberg. Following this encounter some thirty Spanish settlers built the first adobe village in southern Colorado, not for

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[7] Quoted in Alfred B. Thomas, *After Coronado* (Norman: University of Oklahoma Press, 1935), p. 69.

[8] Among the better early maps of southern Colorado were those drawn by cartographers Bernardo de Miera y Pacheco in 1778 and Juan López in 1795.

themselves but for the Comanches who they hoped would settle down. Located on the Arkansas River (the Rio Napeste in the contemporary documentation) the Spaniards named it San Carlos.[9] The Comanches didn't remain there for long but the force of Spanish arms had persuaded them to keep the peace for another sixty years. Foreigners too learned about Spanish control. When American Zebulon Pike moved into southern Colorado in 1806, established a fort on the Conejos River the following year, and raised the American flag, he was arrested by Spanish troops and taken first to Santa Fe and later to Chihuahua City for incarceration. The Spanish authorities wanted to hear nothing of Pike's Peak. They had already discovered the impressive cone and had named it El Capitán.

The Boundary of Hispanic Colorado

The northern boundary of New Spain had always been vague. Some of the eighteenth century Spanish expeditions had moved north of the Arkansas River but Spain had made no real effort to claim the territory further to the north. The exact boundary line seemed especially insignificant after Spain acquired Louisiana from France in 1763. Spain's French rival had in that arrangement forfeited all claims to the territory west of the Mississippi. But when France reacquired the Louisiana territory in 1800, and agreed to sell it to the United States three years later, the boundary between United States and Spanish territory became important indeed.

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[9] Abbott, Leonard and McComb, *Colorado*, p. 30.

The Louisiana Purchase Treaty, however, proved to be vague on the matter or boundaries. As the expedition of Zebulon Pike into Spanish territory had demonstrated, the United States was unsure of what it had purchased.

The boundary issue in Colorado was resolved a few years later when the United States purchased Florida from Spain. The framers of the Adams-Onís Treaty, signed in 1819 and ratified in 1821, took the occasion to correct the vague passages in the Louisiana Purchase. They formalized what had already become accepted by Spain and its international rivals on the North American continent. Spanish territory in Colorado terminated at the Arkansas River. Article III of the Adams-Onis Treaty carefully plotted a line moving north and west from the Gulf of Mexico to the Red River and " . . . running thence by a Line due North to the River Arkansas, thence following the Course of the Southern bank of the Arkansas to its source in the Latitude 42. North, and thence by that parallel of Latitude to the South-Sea [Pacific Ocean]."[10] To reinforce the works of the treaty-makers, Spanish soldiers erected a fort on the headquarters of the Huerfano River the same year the document was signed. Colorado south of the Arkansas, that portion of the state not included in the Louisiana Purchase, was clearly Hispanic Colorado.

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[10] The text of the Adams-Onis Treaty has been published many times. A convenient reproduction of this and other pertinent articles in found in Armin Rappaport, *Sources in American Diplomacy* (New York: The Macmillan Company, 1966), pp. 32-33.

The Mexican Land Grants

With international recognition of Spain's title to southern Colorado the Period of defensive expansion ended. Colonization and settlement would follow. Initial plans were disrupted by the chaotic period of Mexico's independence from Spain and by the formidable challenges Mexico faced in building a new nation state. But by the 1830s and 1840s the threat of United States westward expansion combined with population pressures and demands for new irrigable lands in northern New Mexico to open a new Phase in the history of southern Colorado.

There is some indication that the actual settlement of southern Colorado might have begun during the late colonial period. Colorado's first territorial governor, William Gilpin, for example, met Amidor Sánchez in 1864 on the Sangre de Cristo Grant. Sánchez was reportedly 101 years old at the time of this encounter and informed Gilpin that he had been born in the house in which he was still living.[11] When Captain Zebulon Pike explored Colorado in 1807 he reported finding a road (not a trail) in the San Luis Valley, another indirect indication of settlement in the years immediately prior to Mexican independence.[12] The evidence is far from conclusive but any settlement that occurred during the period of Spanish rule was at best sporadic and widely scattered. This pattern would change in the decades ahead.

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[11] Forbes Parkhill, "Colorado's Earliest Settlements," *Colorado Magazine* 34 (October, 1957), p. 241.

[12] Parkhill, "Colorado's Earliest Settlements," p. 242.

The second quarter of the nineteenth century witnessed the consolidation of Hispanic control of southern Colorado through the mechanism of the land grant. The first known request for a formal land grant in Colorado was made in late 1828 or early 1829 by Miguel Garcia, Julian Gorden and Jose Manuel Copas. They asked for a land grant on the Rio de la Culebra in the San Luis Valley. Because Gorden and Copas were not Mexicans, but United States citizens living in the Taos region, New Mexico Governor Francisco Serracino denied the request on June 6, 1829.[13] Other petitioners would encounter much greater success.

In the 1830s and 1840s six large land grants were made by New Mexico governors in what would later become Archuleta, Conejos, Alamosa, Costilla, Rio Grande, Saquache, Las Animas, Huerfano, Pueblo, Bent and Otero Counties. Four of these grants, the Tierra Amarilla Grant (650,000 acres), the Conejos Grant (2,000,000 acres); the Sangre de Cristo Grant (1,038,195 acres), and the Beaubien and Miranda Grant, later referred to as the Maxwell Grant (1,714,764 acres) straddled the present-day Colorado-New Mexico border. The remaining two grants, the Vigil and St. Vrain Grant (4,000,000) and the Gervacio Nolan Grant (575,968 acres) were entirely in Colorado.[14]

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[13] The document containing the request has been lost but the governor's rejection is contained in Serracino, Cabesa de Vaca and Baca y Terres to Exmo Sor, June 6, 1829, Spanish Archives of New Mexico, I, Reel 3, Frame 6.

[14] An outline map of these grants is contained in an excellent article written by former Colorado Governor Ralph Carr. See his "Private Land Claims in Colorado," *Colorado Magazine* 25 (January, 1948), pp. 10-30.

Some of the grantees obtained their land for growing crops and grazing sheep and cattle. The early settlement of the land grants was fraught with difficulties. The Gervacio Nolan Grant was occupied and cultivated by settlers brought in by the grantee but activities were interrupted almost annually by Indian hostilities. The Vigil and St. Vrain grantees experienced similar difficulties but were able to construct a number of houses on the Purgatoire River and graze between 1,500 and 1,600 head of cattle on the grant before the Mexican War.[15] The Sangre de Cristo Grant attracted on a few settlers, most of whom grazed sheep.

The Conejos community grant was a more ambitious undertaking. Its clear purpose was colonization. The grant was made originally in 1833 by Governor Francisco Serracino to forty northern New Mexico families. They attempted settlement the following year but were ultimately forced to return to New Mexico because of an entire series of Indian depredations. In 1842 the grant was renewed, this time to eighty-four Mexican heads of families, led by Seledón Valdez, Julián Gallegos, Antonio Martínez, and José María Martínez. Each head of family was given an individual plot of land, fronting on the San Antonio River, near its confluence with the Conejos.[16] Settlement of the grant began the following year as land

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[15] William W. Morrow, *Spanish and Mexican Private Land Grants* (San Francisco: Bancroft-Whitney Company, 1923), p. 130.

[16] A useful study of this grant is Purnee A. McCourt, "The Conejos Grant of Southern Colorado," *Colorado Magazine* 52 (Winter, 1975, especially pages 37-40).

was plowed, *acequias* (irrigation ditches) dug and crops planted. The colonists enjoyed a precarious existence in the decade which followed as Indians, Utes and Navajos, periodically drove them off the lands they were trying to settle,[17] but they kept coming back. At the same time that these Mexican families were trying to carve out new lives for themselves, Medano Springs, at the western foot of Mosca Pass, was occupied and continued to be occupied throughout the 1830s.[18]

Other Mexicans moved north at about the same time to live in isolated *ranchos* from where they farmed, trapped, grazed sheep and hunted.[19] When they came together in tiny rural communities these incipient villages were termed *plazas* or *placitas*. The presence of ranchos and placitas is revealed in some of the contemporary travel literature[20] but once again the precise activities of these early Mexican residents have largely escaped the historical record. What is not in doubt is that

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[17] The fortunes and misfortunes of the first Mexican settlers in Colorado are traced in LeRoy R. Hafen, "Mexican Land Grants in Colorado," *The Colorado Magazine* 4 (May, 1927), pp. 82-93.

[18] Parkhill, "Colorado's Earliest Settlements," pp. 242-249.

[19] Marc Simmons defines rancho as "one or more Spanish households located adjacent to farm and orchard lands." They were a characteristic feature of the New Mexico landscape by the eighteenth century. See Simmons, "Settlement Patterns and Village Plans in Colonial New Mexico," *Journal of the West* 8 (January, 1969), p. 13.

[20] As an example Lewis H. Garrard describes a Colorado rancho north of Raton Pass in 1847 in his *Wah-To-Yah and the Taos Trail* (Norman: University of Oklahoma Press, 1955), pp. 144-146.

the Hispanization of southern Colorado, including the beginning of settlement and colonization had fully two hundred years of history when the Mexican War resulted in a change of territorial sovereignty in 1848. This Hispanization intensified during the next fifteen years.

Southern Colorado in the New Mexico Territory

When New Mexico became part of the United States following ratification of the Treaty of Guadalupe Hidalgo the northern boundary of the New Mexico Territory remained exactly as it had been delineated in the Adams-Onis Treaty of 1819. And when the territory was broken into counties in January of 1852, southern Colorado became part of Taos County.[21]

As the laws of the New Mexico territory were defined by the Legislative Assembly local Hispanic law and custom were woven into the new legal fabric and, on occasion dominated it. Water law affords an excellent example. In July of 1851 and January of 1852 the New Mexico Territory enacted water legislation to regulate irrigation ditches (*acequias*). The new laws made clear distinctions between private ditches and common ditches and between main ditches and collateral ditches. They provided for ditch super visors to be elected by local inhabitants and specified the duties of these supervisors. All persons using a common ditch were required by law

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[21] See Section 4 of the Act of 6th January, 1852, *Revised Statues and Laws of the Territory of New Mexico in Force at the Close of the Session of the Legislative Assembly Ending February 2, 1865* (St. Louis: E. P. Studley and Company Printers, 1865).

to provide labor for its annual cleaning and repair in proportion to the amount of their land watered by the ditch. Penalties for illegal diversions and other infractions were specified as well.[22] The entire water system articulated in the Territorial legislation is almost indistinguishable from that already in place under Spain and Mexico, the new Territory's antecedent sovereigns.[23] The system was neither riparian nor based on the doctrine of appropriation. It combined features of both with other elements of Spanish jurisprudence. The resulting corpus of law applied to all of the New Mexico Territory, including Colorado south of the Arkansas River.

In the decade of the 1850s thousands of New Mexican Hispanics moved north with the purpose of reclaiming lands that had been lost earlier by their ancestors to the Indians. They were looking for irrigable lands and suitable pasture for their cattle, goats and sheep. The Permanent Hispanic settlement of San Luis on the Culebra Creek, founded by migrants from the New Mexico towns of Taos and Mora, dates from 1851. It was followed in 1852 by the foundation of San Pablo. San Acacio was

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[22] Act of 20th July, 1851 and Act of 7th January, 1852, *Revised Statutes and Laws of the Territory of New Mexico.*

[23] Spanish and Mexican water law, including those matters treated here, is developed in Michael C. Meyer, *Water in the Hispanic Southwest: A Social and Legal History, 1550-1850* (Tucson: University of Arizona Press, 1984). See also Marc Simmons, "Spanish Irrigation Practices in New Mexico," *New Mexico Historical Review* 47 (April, 1972), 135-150 and Alvin Sunseri, "Agricultural Techniques in New Mexico at the Time of the Anglo-American Conquest," *Agricultural History* 47 (October, 1973), 329-337.

founded in 1853 and within that same decade the Mexican Villages of San Pedro, Guadalupe, Los Fuentes, Chama and Conejos came into existence. Costilla and Trinidad followed shortly thereafter. A tiny Mexican rancho called La Plaza de los Leones, settled by a stock raising family, the Atensios in 1858 (perhaps 1861), later became Walsenberg.[24] By 1860 more than 2,000 Mexican farmers were working forty *acequias* mostly in the river basins encompassed by the land grants made by the governors of New Mexico two decades earlier.[25] There were thirty-seven plazas in southern Colorado.[26] These native New Mexicans, of course, had not migrated into a new territory as no Political line yet divided New Mexico from southern Colorado. They had simply moved north in search of a better life for themselves and their families.

Hispanics in the Colorado Territory

In February of 1861 the United States Congress created a separate territory for Colorado. The enabling legislation removed that portion south of the Arkansas from the jurisdiction of the New Mexico Territory and placed it

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[24] Richard L. Nostrand, "A Century of Hispanic Expansion," *New Mexico Historical Review* 62 (October, 1987), pp. 361-386.

[25] See Abbott, Leonard and McComb, *Colorado*, p. 141. The estimate is probably low as in the year 1860 there were some 1,500 Mexicans living on the Conejos Grant alone. See Judith Gamble, "Colorado's Hispanic Heritage," *Colorado Heritage* 3 (1988), p. 4.

[26] Hugh and Evelyn Burnett, "Madrid Plaza," *Colorado Magazine* 62 (Summer, 1965), p. 224.

within the the boundaries of the new Colorado territory.[27] The Mexican presence in the southern portion of the territory was clearly recognized as Section V of the Territorial Act defined citizenship. Included as citizens, with the full right to vote and hold public office were "those recognized as citizens by the Treaty with the Republic of Mexico, concluded February two, eighteen hundred and forty-eight [the Treaty of Guadalupe-Hidalgo] and the treaty negotiated with the same country on the thirteenth day of December, eighteen hundred and fifty-three [the Gadsden Purchase Treaty] . . . "[28]

The property rights of Mexicans were already protected by the Treaty of Guadalupe-Hidalgo but further protection was afforded by the territorial act which, in Section 6 stated that "no law shall be passed impairing the rights of private property."[29] If Mexican Property rights exceeded those of citizens north of the Arkansas, or elsewhere in the United States, the Territorial Act provided relief here as well. Section 16 allowed that " . . . the Constitution and all laws of the United States *which are not locally inapplicable* [emphasis mine] shall have the same force and effect within the said Territory of Colorado as elsewhere within the United States."[30]

Hispanics from that portion of the territory south of the Arkansas River sat in the Colorado Assembly from

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[27] An Act to Provide a Temporary Government for the Territory of Colorado, February 28, 1861, Thirty-Sixth Congress, Second Session.

[28] Ibid., Section V.

[29] Ibid., Section 6.

[30] Ibid., Section 16.

the very beginning. The first two Hispanic assemblymen, Victor García and Jesús Barela, represented Pueblo and the San Luis Valley. Neither of them spoke English but the Territorial government provided translators for them.[31] In their representation of their respective districts they, and their Hispanic successors, assumed a special responsibility. They sought to assure that the Territorial Assembly would recognize the distinct laws and customs of Hispanic Colorado. As will be shown below they were successful in this effort.

Hispanic Culture in Southern Colorado

The towns of San Luis, Acacio, Guadalupe, Conejos, Trinidad and Costilla were more than 2,000 miles north of Mexico City. But those early Mexican families who settled southern Colorado in the 1830s, 1840s and 1850s were able to maintain their Hispanic culture. Some of it was preserved intact and some of it underwent the inevitable mutations and improvisations always found in peripheral areas isolated from the metropolitan core.

The language of southern Colorado in the middle of the nineteenth century was Spanish and the religion of its settlers, a Roman Catholicism strongly influenced by the liturgy, rites and pageants of the Penitential Brothers (Los Hermanos de los Penitentes).[32] The first church structure

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[31] Howard Roberts Lamar, *The Far Southwest 1846-1912: A Territorial History* (New York: W. W. Norton, 1970), p. 236.

[32] The most thorough study of the penitentes is Marta Weigle, *Brothers of Light, Brothers of Blood: The Penitentes of the Southwest* (Albuquerque: University of New Mexico Press,

within the future boundaries of the state of Colorado went up in Conejos in 1858[33] and, in the best Mexican tradition, it was called Nuestra Señora de Guadalupe in honor of the patroness saint who appeared in Mexico City three centuries earlier. The southern Colorado region was made subject to the Diocese of Santa Fe.

Many of the first towns in Hispanic Colorado were laid out in the Spanish tradition. They were built around a central Plaza and when deemed necessary for defensive purpose the plaza was enclosed by a strong wall.[34] The prime building material, adopted from the Pueblo Indians of New Mexico, and modified in the Rio Grande Valley, was adobe. The architectural forms were almost a carbon copy of those found to the south along the Rio Grande between Taos and El Paso. Ceilings were supported by heavy vigas, the ends of which Penetrated the outer front walls. Private houses, generally of two or three rooms, seldom had windows or doors in the rear. This architectural anomaly, combined with the thick adobe walls, gave the individual house a fortress-like structure, obviously of great benefit in the case of Indian attack. Unlike a wooden structure, a house built of adobe bricks could not easily be penetrated or set on fire.

1976). A short but useful article on the same subject is E. R. Vollman, S. J., "Religious Processions and Penitente Activities at Conejos, 1874," *Colorado Magazine* 31 (July, 1954), pp. 172-179.

[33] Carl Ubbelohde, *A Colorado History* (Boulder: Pruett Press, Inc., 1965), pp. 56-57.

[34] The town of Costilla, for example, had an enclosed plaza. See Abbott, Leonard and McComb, *Colorado*, p. 43.

Food preparation (chile, frijoles tortillas and atole) was identical to that of parents or grandparents from Albuquerque or Chihuahua City. As in New Mexico kinship patterns and the practice of *compadrazco* (godparenthood) resulted in closely knit families and strong social relationships. Similarly the folk art, folk medicine and folk literature of those early Colorado Hispanics, especially the religious ballads known as *alabados*, were part of the cultural baggage carried with them as they moved north from Santa Fe and Taos.[35] They celebrated the same feast day, used the same herbal medicines, told the same stories to the children, performed the same religious plays and danced to the same music as their New Mexico relatives to the south.[36]

The early Mexican settlers lived in tiny rural communities and dedicated themselves primarily to subsistence agriculture. Some brought a few cattle, goats and sheep with them and began grazing them in the San Luis Valley and also north of Raton Pass in the area surrounding Trinidad. They also brought the experience they had

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[35] The *alabados* of northern New Mexico and southern Colorado are examined in J. Manuel Espinosa, "Additional Hispanic Versions of the Spanish Religious Ballad 'Por el Rastro de la Sangre'," *New Mexico Historical Review* 565 (October, 1981), pp. 349-367 and Thomas J. Steele, S.J., "The Spanish Passion Play in New Mexico and Colorado," *New Mexico Historical Review* 53 (July, 1978), pp. 239259 and Thomas J. Steele, S.J., "The Death Cart: Its Place among the Santos of New Mexico," *Colorado Magazine* 55 (Winter, 1978), pp. 1-14.

[36] The cultural life of Colorado's early Hispanic population is skillfully traced in Arthur L. Campa, *Hispanic Culture in the Southwest* (Norman: University of Oklahoma Press, 1979), pp. 147-152.

gained in New Mexico in apportioning land and water. Land was partitioned in long-lot fields. These long but narrow strips of land gave each settler at least 100 or 150 yards of stream or ditch frontage from which individual irrigation systems could be built. The same pattern had long been used in New Mexico's upper Rio Grande Valley.[37] On these strips the Colorado Mexicans began growing corn, chile, beans, peas, wheat, onions, beets and cabbages. When water became scarce because of a less than sufficient spring runoff they entrusted the delicate task of water allocation to a ditch supervisor (the *mayordomo*), elected by the irrigators themselves.

Even the budding American trading posts located in the Arkansas Valley exhibited the strong influences of Mexican culture. Bent's Fort, on the north bank of the Arkansas was an adobe structure built by Mexican masons. Most of the residents, as well as the trappers and traders that visited, had Mexican wives from Taos. Janet Lacompte captured the phenomenon in the 1840s well:

> Taos had importance to the Arkansas Valley settlements all out of proportion to its size. From Taos came indispensable items such as whisky, flour, and news. To Taos the Arkansas Valley settlers went for visits, marriages, and baptisms. Because of their close ties with Taos, the Arkansas Valley settlements had a flavor far more Mexican than American, with a culture of

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[37] Alvar W. Carlson, "Long Lots in the Rio Arriba," *Annals of the Association of American Geographers* 65 (March, 1975), pp. 48-57 and Alvar W. Carlson, "Rural Settlement Patterns in the San Luis Valley: A Comparative Study," *Colorado Magazine* 44 (Spring, 1967), pp. 117-118.

saint's days, fandangos, Spanish language, Mexican music and food.[38]

Among the permanent imprints left for future generations to ponder were Spanish names they gave to towns, counties, rivers and mountains: Abeyta, Aguilar, Boncarbo, Cuarto, Delagua, Delcarbon, El Moro, Garcia, Primero, Quinto, Segundo, Trinchera, and Vallaroso (in Las Animas County); Alamosa, Estrella, and Mosca (in Alamosa County); Antonito, Capulin, Conejos, Cumbres Pass, La Jara, Lasauseo, Lobatos, Los Cerritos, Mogote, Paisaje, Platoro, and Romeo (in Conejos County); Blanca, Chama, Jaroso, San Acacio, and San Luis (in Costilla County); Bonanza, La Garita, and Sangre de Cristo (in Saguache County); Cuchara, Farisita, Huerfano River, and La Veta (in Huerfano County); Durango, Florida, Posta, and Vallecito (in La Plata County); Pagosa Springs and Piedra (in Archuleta County).[39] Even the name of the Territory, and subsequently the state, derives from the river named Colorado by the Spaniards in the sixteenth century.

Hispanic law and customs were clearly recognized by the Territorial Assembly. Most important to those who resided between the New Mexico border and the Arkansas River, all laws passed by the Assembly were

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[38] Janet Lecompte, *Pueblo, Hardscrabble, Greenhorn: The Upper Arkansas, 1832-1856* (Norman: University of Oklahoma Press, 1978), p. 67.

[39] A more comprehensive list is contained in J. Frank Dawson, *Place Names in Colorado* (Denver: The J. Frank Dawson Publishing Company, 1954).

translated into Spanish for distribution in the south.[40] And some of the laws themselves took cognizance of the distinctive Hispanic heritage of that region. Territorial water law offers itself as one significant example.

On February 6, 1866 the Territorial Assembly passed "An Act to Regulate Ditches Used for Farming Purposes in the Counties of Costilla[41] and Conejos."[42] In order to recognize and perpetuate Hispanic law and custom the act used the Spanish words *acequia* (ditch) and *acequia madre* (main ditch) throughout. Moreover the substance of the law was in complete harmony with Hispanic water law and practice in the southwest prior to the change of territorial sovereignty at the conclusion of the war between the United States and Mexico.

The Act provided for the election of ditch supervisors a practice which has deep roots in Hispanic Water law. In thirteenth century Valencia, Spain *cequiarius* (ditch supervisors) were communally elected as in Section 1 of the Colorado Act and had the responsiblity of overseeing the cleaning and repair of ditches as in Section 4 of the same

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[40] Lamar, *The Far Southwest*, 237.

[41] Saguache County was subsequently carved out of Costilla County.

[42] An Act to Regulate Ditches Used for Farming Purposes in the Counties of Costilla and Conejos, February 5, 1866 in *General Laws, Joint Resolutions, Memorials and Private Acts Passed at the Fifth Session of the Legislative Assembly of the Territory of Colorado*, pp 61-64.

Act.[43] In the Hispanic Southwest these same practices continued. The *cequiarius*, most often called *mayordomos* or *mandadores* in the Southwest, were responsible for the maintenance of the ditches, as in Section 4 of the Colorado Act, and for the distribution of water, as in Section 5 of the Act.[44] Throughout northern Mexico and the Southwest all persons who used an *acequia* were required to contribute to its maintenance and repair. Those who did not contribute with their own labor had to pay for the work, just as in Section 4 of the Act.[45] During the growing season water for irrigation purposes took precedence over water for other purposes, as in Section 12.[46] Misdemeanors, brought about by misuse of the *acequia*, or the waters contained therein, were subject to fines, as in Section 6 of the Act.[47] Clear distinctions were made between private and public or community *acequias*, as in Section 12 of the Act.[48]

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[43] See Robert Ignatius Burns, "Irrigation Taxes in Early Mudejar Valencia: The Problem of the Alfarda," *Speculum* 44 (October, 1969), p. 563.

[44] See, for example, Alvin Sunseri, "Agricultural Techniques in New Mexico at the Time of the Anglo-American Conquest," *Agricultural History*, 47 (October, 1973), p. 330.

[45] See, for example, Plan de Pitic, Article 21, Mexico, Archivo General de la Nación, Tierras, Vol. 2773, Expediente 22.

[46] See Plan de Pitic, Article 19, Ibid.

[47] Edward P. Arneson, "Early Irrigation in Texas," *Southwestern Historical Quarterly*, 25 (October, 1921), p. 128.

[48] Wells A. Hutchins, "The Community Acequia: Its Origin and Development," *Southwestern Historical Quarterly* 31 (January, 1928), pp. 261-284.

The Territorial Assembly had no second thoughts about the appropriateness of the Act. The 1870 Census reported that over one fifth of the Territory's population was Hispanic.[49] On January 22, 1872 the same act written for Conejos and Costilla counties was extended to Huerfano County[50] and three weeks later it was made applicable in Las Animas County as well.[51]

The Hispanic delegates to the Territorial Assembly were also aware of the traditional procedures to be followed when a new ditch was to be opened. Its general boundaries were recorded in the public record, any special Provisions were noted, and the owner of the ditch

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[49] The Census of 1870 recorded Colorado's population at 39,864. Of this number 8,333 indicated that they had been born in New Mexico. Las Animas had 3,339 born in New Mexico; Conejos, 1,473; Huerfano 1,442; Costilla, 1,137; Pueblo, 569; Saguache 130; and Bent, 96. It is certain that almost all of these persons who listed New Mexico as their place of birth were Hispanics. In addition there were many additional Hispanics in southern Colorado, some born in other Mexican provinces and many children born to Hispanic parents in Colorado itself. An interesting study of the politics of these early Colorado Hispanics is found in William B. Faherty, "Regional Minorities and the Woman Suffrage Struggle," *Colorado Magazine* 33 (July, 1956), especially p. 217.

[50] An Act to Extend and Make Applicable to the County of Huerfano, an Act Entitled "An Act to Regulate Ditches Used for Farming Purposes in the Counties of Costilla and Conejos," January 22, 1872 in *General Laws, Private Acts, Joint Resolutions, and Memorials Passed at the Ninth Session of the Legislative Assembly of the Territory of Colorado*, p. 143.

[51] An Act to Extend and Make Applicable to the County of La Animas, an Act entitled "An Act to Regulate Ditches, used for Farming Purposes, in the Counties of Costilla, and Conejos," Ibid., p. 145.

was reminded of the general water practices in force.[52] On February 12, 1874, in keeping with these principles, the Colorado Territorial Assembly passed a new act concerning irrigation for Las Animas County:

> Be it enacted by the Council and House of Representatives of the Colorado Territory, That the "Acequia" which is about to be constructed by the inhabitants of the river of San Francisco, in the County of Las Animas, Territory of Colorado, and which takes its head at the south or west side of Manuel Ocana's farm, and runs thence in a easterly course until it reaches the farm of Seferino Derrera [Probably Herrera] be recognized by the name of (Acequia Madre) or Main Ditch.
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> 2. That the Superintendent of this Acequia be elected according to section one (1) of the Revised Statutes of Colorado, page 365 that he be empowered to call out all persons using water from the Acequia, respectively to repair

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[52] Ditch legislation and adjudication of ditch disputes in the Hispanic southwest can be traced in the following documents: Ayuntamiento de Abiquiu to Jefe Politico Santiago Abreu, July 4, 1832, Mexican Archives of New Mexico, Reel 15; Manuel Martinez to Jefe Politico, July 3, 1832, Mexican Archives of New Mexico, Reel 15; Autos de la Visita General de este Reino de la Nueva Mexico fechos por el Señor Sarxto Maior Dn Joaquin Codallos y Rabal, Govr y Capn Gral de dho Reino . . . Aug 16 to Oct 20, 1745, Spanish Archives of New Mexico, II, 470; Los Dueños de la Labor de Abajo to Governor Martinez, Feb. 22, 1822, Bexar Archives, Reel 70; Testimonio, Bernalillo, Nuevo Mexico, July 18, 1829, University of New Mexico, Seligman Collection; Santa Ana – Angostura, and Ysabel Jorge, Phelipe Gallegos, and Antonio de Gurule vs. Xristopal Garcia, Jan. 7 to Feb. 9, 1733, Spanish Archives of New Mexico, I, 379.

> the Acequia, or Dam and he who shall fail to supply his share of work on the Acequia, or Dam, shall be liable to a fine imposed by the Superintendent in a sum not less than two (2) nor more than six (6) dollars for each and every day he is absent when required. And said sum shall be applied to the benefit of said Acequia.[53]

It is significant that none of the above mentioned Acts were extended to Larimer, Weld, Boulder, Jefferson, or other counties north of the Arkansas where the water traditions reflected a very different cultural inheritance. But in the passage of the Acts of 1866, 1872, and 1874 the Territorial Assembly of Colorado clearly acknowledged what the residents of southern Colorado already knew. It acknowledged what the heirs of Luis Maria Cabeza de Vaca knew when they selected the land for the fourth of their five floats. Colorado south of the Arkansas was a cultural continuum of New Mexico. Law and custom in this part of the Colorado territory were Hispanic law and custom.

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[53] An Act Concerning Irrigation, February 12, 1874 in *General Laws, Private Acts, Joint Resolutions, and Memorials Passed at the Tenth Session of the Legislative Assembly of the Territory of Colorado* (Central City, Register Printing House, 1874), pp. 167-168.

DISTRICT COURT, WATER DIVISION 3, COLORADO

Case No. 86CW46

MOTION, WITH RECITATION OF AUTHORITIES, FOR ORDER GRANTING APPLICANT DUE PROCESS IN FORM OF NOTICE, EVIDENTIARY HEARING, DISCOVERY, AND ESTABLISHING ISSUES AND PROCEDURE FOR SAME

CONCERNING THE APPLICATION FOR WATER RIGHTS OF AMERICAN WATER DEVELOPMENT, INC.,

IN ALAMOSA, CONEJOS, COSTILLA, HINSDALE, MINERAL, RIO GRANDE AND SAGUACHE COUNTIES.

Applicant American Water Development, Inc. (hereinafter "American Water" or "Applicant"), by and through the undersigned attorneys of Saunders, Snyder, Ross & Dickson, P.C., hereby respectfully moves this Court to enter an Order providing Applicant with its due process rights in the form of notice pleading, an evidentiary hearing, discovery regarding the Objectors' claims attributable to dismissal of the tributary claim and establishing the issues and procedure to be followed in order to provide American Water with due process. In support hereof, Applicant states and avers as follows:

1. On September 26, 1991, American Water moved to dismiss its claim for tributary water rights pursuant to C.R.C.P.41(a)(2) and other authority. Applicant's motion

was granted by the Court. The Applicant acknowledged the authority of the Court to conduct a subsequent hearing on the imposition of terms and conditions, including attorneys fees and costs. However, the Court proceeded, without the benefit of a formal motion for attorneys fees and costs or an evidentiary hearing, to order that Applicant pay Objectors' attorneys fees and costs reasonably and necessarily incurred in opposing the tributary claim. This decision has no foundation in fact, was reached without an evidentiary hearing and was made in violation of Applicant's substantive and procedural due process rights. The only matter the Court left to be determined at the subsequent hearing was the amount of fees and costs to be paid.

2. The Court erroneously relied solely upon Rule 41(a)(2) C.R.C.P. and ignored the Applicant's reliance upon Rule 11 and § 13-17-102(5) 6A C.R.S. (1987). The use of Rule 41(a)(2) was solely as a mechanism for the Applicant to perform its statutory obligation to withdraw a claim within a reasonable time after it became aware that it could not prevail on the claim. Under the statutory provision, attorneys fees may not be assessed if the dismissal was within a reasonable time. Section 13-17-102(5), 6A C.R.S. (1987). As shown in Applicant's Reply Brief on the Motion to Withdraw, Colorado law allows an Applicant to complete the formation of its intent to appropriate tributary water up to the close of evidence. Applicant's Reply Brief p. 13-20.

Objectors' entitlement to attorneys' fees is contrary to the American Rule that a party bear its own attorney fees and any exception must be based upon a substantive

right to recover such fees. Rule 41(a)(2) is not the substantive mechanism, rather Rule 11 and 13-17-101 *et seq.* 6A C.R.S. (1987) provide the exclusive basis for awarding fees in civil litigation in Colorado. The Court cannot award fees in absence of an underlying finding of bad faith or prosecution of frivolous or groundless claim. *W.L. Gore & Associates, Inc. v. Oak Materials Group, Inc.* 424 F.Supp. 700, 702 (D. Del. 1976). Nor can a court award fees solely on the basis of assertions and opinions by Objector's counsel, unsupported by facts in the record. Id. at 702. When there are disputed issues of fact, as the Court itself acknowledged with respect to reasonableness of the timing of the motion to dismiss (Transcript 10/10/91 p.77 15-19), an evidentiary hearing must be held to resolve them. *Matter of First Colonial Corp. of America*, 544 F.2d 1291, 1300 (5th Cir. 1977).

This Court's failure to hold a hearing on the reasonableness of the timing of filing the motion to withdraw denied Applicant its right to due process under the law. In addition, the subsequent amendment of Rule 11 and adoption of the statute supersede the provisions of Rule 41(a)(2). The Court's error can be corrected by providing for an evidentiary hearing to include these issues. Any award of attorneys fees and costs made in the absence of a factual determination following an evidentiary hearing would be fatally flawed.

3. The Objectors, by making a claim for attorneys fees and costs (which they have not formally done to date) are making a claim for injury to their property. In order to be able to have a fair and reasonable opportunity to respond to such a claim, Applicant is entitled to have a formal pleading from the Objectors setting forth the

nature, amount and grounds for each claim in order to afford the Applicant with a notice of claim upon which it can formulate a response and present any defenses available to it. To hold otherwise would constitute a clear denial of due process to the Applicant. See, *National Assoc. of Concerned Veterans v. Secretary of Defense,* 219 App. D.C. 94, 675 F.2d 1319, 1329 (1982)

4. Even if the Court should find after an evidentiary hearing on entitlement that the imposition of fees and costs as a term and condition is appropriate, it must make numerous factual determinations to decide the reasonableness of the fees, their relation to the tributary claim, their necessity, whether the work product would be useful in a subsequent tributary case, the existence of duplication and the appropriateness of applying Rule 41(d) C.R.C.P. to the circumstances of this case. There is no question but that a claim of the magnitude suggested by the Objectors in their answer brief to the motion to dismiss will result in disputed factual issues requiring an evidentiary hearing. *See, e.g., Siberman v. Bogle,* 683 F.2d 62 (3rd Cir., 1982); *Fitzpatrick v. Internal Revenue Service,* 665 F.2d 327 (11th Cir. 1982). To avoid unnecessary time and expense, the Court should conduct the entitlement phase of the hearing first, and stay discovery and hearing on the computation phase pending a determination as to entitlement.

5. The standards set forth in § 13-17-103, 6A C.R.S. (1987) would also be applicable in the evidentiary hearing. Under the application of those standards, Objectors would not be entitled to a recovery of attorneys fees. Based on the language of the statute requiring consideration of factors such as availability of facts, the effort

made to determine the validity of the claim, the absence of bad faith, and the right to pursue contracts to the close of evidence, these standards will establish that an award of fees is inappropriate. In the present matter, an evidentiary hearing would establish that the determinative facts were incontravertible and there was a valid right to pursue the tributary claim in good faith.

6. Although Applicant contests any entitlement of the Objectors to an award of fees and costs, the burden of proof still rests with the Objectors in proving such a claimed entitlement and the reasonable amount thereof. *W. L. Gore & Associates, Inc. v. Oak Materials Group, Supra,* at 702. American Water is entitled to reasonable discovery to meet the opponents' proof and to put on its own proof. Id.

7. A claim to attorneys fees and costs and the reasonableness thereof raises new issues of fact in this matter and no discovery has been had thereon. Such discovery is essential for a fair disposition of these issues.

8. The opponent of a fee petition is entitled to take discovery of the fee petitioner in order to appraise the reasonableness of the fee request. *National Assoc. of Concerned Veterans v. Secretary of Defense,* 219 App. D.C. 94, 675 F.2d 1319, 1329 and n.5 (1982), *Stastny v. Southern Bell Tel. & Tel. Company,* 77 F.R.D. 662 (W.D. N.C. 1978).

9. In order to facilitate an efficient disposition of the issue concerning fees, Applicant requests this Court to enter an Order requiring all the Objectors claiming such an entitlement to submit a written pleading in the form of a motion or claim, supported by legal authority, detailing any and all claims and the amount and justification for

each claim. This initial pleading shall provide a framework for subsequent discovery regarding the issue of fees and costs, as well as notice to American Water of all claims asserted by Objectors, so it can formulate its answer and defenses. American Water should have a minimum of 20 days in which to answer.

10. Applicant requests that this Court authorize discovery by the Applicant, including interrogatories, requests for admissions, requests for production of documents, and depositions against the Objectors regarding the issue of fees and costs, but limited solely to issues raised in the pleadings. By making a claim for attorneys fees, the Court should deem the Objectors to have waived with respect to all matters related to bills, time records and other supporting documents.

11. Applicant would request this Court to enter an order allowing 60 days from the date Objectors file their claims in which to complete discovery on the Objectors' claim pleading subject to extension upon a showing of good cause or in the Court's discretion.

12. The Objectors are not entitled to recover any fees which were incurred in discovering information in researching and pressing legal arguments that were *useful* in the nontributary claim that actually proceeded to trial. *McCants v. Ford Motor Co.*, 781 F.2d 855 (11th Cir. 1986), appeal after remand 789 F.2d 1539 (11th Cir. 1986). Rather, courts require a fee opponent to reimburse a fee petitioner for only that " . . . *portion* of his expenses of litigation." which are related to the dismissed claim. (Emphasis added.) *Id.* at 860.

13. Further, the Objectors are not entitled for reimbursement for any expenses incurred in preparing work product that was *or will be* useful in future litigation. *McLauqhlin, et al. v. Cheshire,* 219 App. D.C. 257, 676 F.2d 855 (1982); *Radiant Technology Corp. v. Electrovert U.S.A.,* 122 F.R.D. 201 (N.D. Tex. 1988). If dismissal is conditioned on payment of fees, the amount must be limited to compensation for work which cannot subsequently be used. *Taragan v. Eli Lilly and Co.,* 838 F.2d 1337 (D.C. Cir. (1988); *Cauley v. Wilson,* 754 F.2d 769 (7th Cir. 1985).

14. The mere fact that Objectors incurred attorneys fees and expenses in opposing Applicant does not entitle them to an award of fees. *Aggregates, Inc. v. Kruse,* 134 F.R.D. 23 (D. Puerto Rico 1991).

15. In discussing a case wherein it was alleged that a legitimate reason for dismissal without prejudice had not been offered, the United States Court of Appeals for the Seventh Circuit stated:

> The [Objectors] have fought the [Applicant] every possible inch of the way for over six years in court concerning the validity of the proposed . . . action. . . . A major reason why the . . . problem has not been resolved at this point in time is the continuous and protracted litigation of the case. While we do not fault the [Objectors] for exercising their constitutional right to defend this action in the manner they believe is most appropriate, it is "too late in the day" for them to complain that they somehow have been prejudiced by the delay in this case in proceeding to trial for they actively participated in this litigation . . .

United States v. Outboard Marine Corp., 789 F.2d 497 at 504 (7th Cir. 1986), *cert. denied* 479 U.S. 961 (1986).

16. Due to the complex nature of the claims, the common applicability of substantially all research and expert witness testimony to both the nontributary and tributary claims, the type and number of experts involved, the Court's prior allocation of discovery costs, and the number of parties and attorneys involved, the Objectors' claim for fees and costs cannot be treated like a garden variety attorney fee claim. The necessity to decide complex factual issues and the potential magnitude of the claims mandate that the Applicant be afforded the full range of due process rights, including full and adequate notice of the claims, a full and fair opportunity to respond and prepare for an evidentiary hearing, including the right to reasonable discovery and adequate time to analyze the claims, respond and prepare for the evidentiary hearing.

WHEREFORE, American Water respectfully requests the Court to enter an order granting its motion for the establishment of its due process rights in the form attached hereto.

Respectfully submitted this 1st day of November, 1991.

DISTRICT COURT, WATER DIVISION 3, COLORADO

Case No. 86CW46

APPLICANT'S REPLY

CONCERNING THE APPLICATION FOR WATER RIGHTS OF AMERICAN WATER DEVELOPMENT, INC.,

IN ALAMOSA, CONEJOS, COSTILLA, HINSDALE, MINERAL, RIO GRANDE AND SAGUACHE COUNTIES.

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I. INTRODUCTION

Applicant American Water Development, Inc. ("Applicant" or "American Water"), by and through its undersigned counsel, hereby files this Reply to Objector's Response to Applicant's initial motion in this matter for an order granting Applicant due process in the form of notice, evidentiary hearing, discovery, and establishing issues and procedures for conducting a hearing regarding the award of fees and costs, if any. American Water seeks a full evidentiary hearing so that it may ascertain the factual and legal bases for defenses to any award of attorneys[1] fees and costs, in order to guarantee that American Water's due process rights are protected. Attached to this Reply is Applicant's offer of proof which demonstrates to the Court the necessity for issuing an order requiring procedures to ensure that the Applicant is afforded due process in the determination of the fees and costs issue through an evidentiary hearing including discovery. (Exhibit B.)

II. REPLY BRIEF

A. American Water's Initial Motion for Evidentiary Hearing and Due Process of Law.

On November 4, 1991, Applicant filed its due process motion ("Motion") for an order for adequate notice, an evidentiary hearing, discovery, and establishment of issues and procedures for determining the right to costs and fees as a term and condition for voluntary dismissal

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[1] The term "attorneys' fees" appears throughout, by editorial design, without the use of a possessive apostrophe.

of its tributary claim. The factual background leading to the filing of the Motion was set forth in Applicant's Motion and is known to the Court.

In Applicant's Motion, it was noted that the Court had stated at the pretrial conference in September 1991, that the dismissal of Applicant's tributary claim would be granted but that terms and conditions of that dismissal would be imposed by the Court, including an award of costs and fees, presumably including attorneys fees, to the Objectors. Applicant's Motion, however, pointed out that the American Rule governs in cases such as this requiring that each side pay its own attorneys fees (*see, e.g., Bass v. United States,* 379 F. Supp. 1208 (D. Colo. 1974), except under specific substantive statutes allowing recovery. The Motion further asserted that the Motion to Dismiss was filed pursuant to Rule 41(a)(2), C.R.C.P., only as a means of fulfilling Applicant's obligation under Rule 11, C.R.C.P., and § 13-17-102, C.R.S. (1987). Applicant's Motion further stated that Applicant would be denied its due process rights unless an opportunity by means of an evidentiary hearing was afforded in order to present evidence as to the appropriateness of an award of fees and costs, as well as to present evidence with respect to the applicability and reasonableness of any costs or fees claimed by Objectors to be attributable to the dismissed claim. Applicant noted that it is the Objector's burden of proof to establish entitlement and reasonableness of amounts claimed. While the Court seems to acknowledge the necessity of a hearing on the reasonableness of fees claimed, it has overlooked the more fundamental issue of the application of Colorado's Rule 11 and § 13-17-102, C.R.S.

The law expressly provides that no award of fees shall be made in circumstances such as those in the present case. *See* Part B, below. Applicant requested that the Court enter an order requiring Objectors to file a bill of costs as soon as possible, and that Applicant would respond to such bill of costs within 20 days. Further, Applicant requested the Court to allow 60 days, running concurrently with the aforementioned 20 day period, to conduct discovery on the factual basis for the bill of costs as well as its reasonableness. Applicant further asked the Court to declare that Objectors have waived any claim of privilege with respect to any material or opinions which comprise the bill of costs. To date, American Water has received no documentation from Objectors in support of their claims. Under these circumstances, it would not be possible for Applicant to review and respond to claims which could well total hundreds of thousands, if not millions of dollars, within the short time period of one or two days suggested by the Court.

B. Attorneys Fees and Costs Appropriate Only Under Certain Conditions

1. Discussion of American Rule.

Objectors appear to contend that they are "presumed" to be entitled to fees based on the fact that Applicant dismissed its tributary claim. Such contention, however, ignores the long-standing rule ("American Rule") that absent a specific statute or enforceable contract, litigants pay their own attorneys fees. *See Shields v. Shelter,* 120 F.R.D. 123 (D. Colo. 1988); *Bass v. United States,* 379 F. Supp. 1208 (D. Colo. 1974); *Andrews v. Blue,*

489 F.2d 367 (10th Cir. 1973); *Amerine National Corp. v. Denver Feed Co.*, 493 F.2d 1275 (10th Cir. 1974).

Defendants are not entitled to an award of attorneys fees as an automatic consequence of dismissals. *See Weir v. Lehman Newspapers, Inc.*, 105 F.R.D. 574 (D. Colo. 1985) (motion to dismiss for lack of subject matter jurisdiction); *Robinson v. C.R. Laurence Co., Inc.*, 105 F.R.D. 567 (D. Colo. 1985) (motion to dismiss for failure to state a claim). Merely because a party is forced to respond to a legal action does not entitle the party to an award of fees where the opposing party does not proceed unreasonably, vexatiously, or frivolously. *See Polger v. Republic National Bank*, 709 F. Supp. 204 (D. Colo. 1989). Therefore, for the Court to impose any award, it must first find that an exception to the American Rule exists. The Objectors have ignored this aspect of Applicant's Motion. Unless there are special circumstances, or unless an express statutory provision controls, the American Rule governs the issue of attorneys fees and costs.

Objectors assert that it is Applicant's position that it is not within the discretion of the Court to impose an award of attorneys fees and costs absent a finding of bad faith. This, however, is a mischaracterization of the Applicant's position. As discussed *infra*, bad faith is only one factor to be considered. Moreover, the Objectors base their entire argument on the fact that the Court may exercise its discretion. However, the Objectors fail to address any of the restrictions placed on the Court's discretion as raised by Applicant. Applicant does not maintain that the Court is unable to impose terms and conditions that are just pursuant to a Rule 41(a)(2) dismissal. However, Applicant does argue assuming,

arguendo, that an award is appropriate, certain guidelines and procedures must be followed. The Court's ability to impose an award of fees and costs is controlled by the procedural and statutory mandates relied upon by Applicant.

2. Rule 11, C.R.C.P., Prohibits Attorneys Fee Award.

Rule 11 of the Colorado Rules of Civil Procedure has been amended to restrict the Court's ability to impose attorneys fees where a voluntary dismissal is filed " . . . within a reasonable time after the attorney or party filing the pleading knew, or reasonably should have known, that he would not prevail on said claim, action, or defense." The Federal Rule 11 does not include this language. For this reason Objectors' reliance on federal cases construing the Rule is wholly misplaced. Applicant relies on federal cases in other instances where there is *no substantive difference* between application of state and federal rules. As set forth in Applicant's Reply Brief in Support of Motion to Dismiss Claims Set Forth in Part IV of the amended application, dated October 10, 1991, Applicant had the right to pursue contractual negotiations until the close of evidence. As further stated in the attached Offer of Proof, Applicant pursued such contractual negotiations in good faith until it became clear that it would be unable to obtain such contracts within the required time frame. Upon this realization, Applicant withdrew its tributary claim in a timely manner. Rule 11 expressly encompasses the circumstances of this case and precludes an award of attorneys fees.

3. Mandatory Considerations of Section 13-17-102, C.R.S.

Should the Court impose attorneys fees and costs in spite of the prohibition of Rule 11, C.R.C.P., it must follow appropriate guidelines and procedures in making such award. In §§ 13-17-102 and 103, C.R.S., factors are imposed which *must* be considered by the Court in *any* award. The Court has made a preliminary indication that it has made fees and costs awards prior to the case at bar and does not feel that the case at bar is materially different in this aspect. In the examples cited by the Court, however, (e.g., domestic law; *see* § 14-10-119, C.R.S.), a specific statute mandates or allows for such imposition. In their Response, Objectors seem to argue that the Court may simply impose any terms and conditions without a hearing as a matter within the Court's sole discretion. While the decision to impose terms and costs certainly is within the Court's discretion, such discretion is not unfettered. Rather, only proper terms and conditions may be imposed. The express language of Rule 41(a)(2) indicates that further inquiry is necessary as opposed to a simple blanket imposition. Notwithstanding Colorado Rule 11, there are specific statutes in Colorado which govern and allow the award of attorneys fees.[2] Absent a specific

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[2] Colorado Revised Statutes provide specific instances where attorneys fees may be awarded: *See, e.g.,*

– § 5-5-202 (award for successful prosecution of action under Colorado Consumer Credit Code);

– § 6-1-113 (authorizing recovery of fees against persons engaging in a deceptive trade practice);

provision, the Court must look to the general existing provision. where specific statutes govern and allow awards of attorneys fees and there are standards set forth in a general statute for such awards, then general rules of construction militate against an award except through those provisions. *Expressio unius est exclusio alterius.* Section 13-17-102(5), C.R.S., mandates that no fees shall be assessed where a voluntary dismissal is filed within a reasonable time after the filing party knew or should have known that it would not prevail. Section 13-17-103 states that, in the event that an award is appropriate, in exercising the court's discretion, a court *shall consider* the following factors:

> (a) The extent of any effort made to determine the validity of any action or claim before said action or claim was asserted;

– § 7-70-110 (fees allowed to persons damaged by fraudulent registration of trademark);

– § 11-51-604 (governing an award for violation of Colorado Securities Act);

– § 12-6-122 (allowing recovery of fees for successful prosecution of action under Colorado Automobile Dealer Licensing Act);

– § 12-14-113 (providing for recovery of fees for violations of Fair Debt Collection Practices Act);

– § 12-44.5-108 (award for successful prosecution of action under Indian Arts and Crafts Sales Act);

– § 13-40-123 (fees allowed to landlord in forcible entry and detainer action);

– § 14-10-119 (providing for an award of attorneys fees in domestic relations cases);

– § 34-60-118.5 (governing award for failure to pay royalties under Oil and Gas Conservation Act; and

– § 35-38-108 (fees allowed to persons damaged by violation of Farm Equipment Fair Dealership Act).

(b) The extent of any effort made after the commencement of an action to reduce the number of claims or defenses being asserted or to dismiss claims or defenses found not to be valid within an action;

(c) The availability of facts to assist a party in determining the validity of a claim or defense;

(d) The relative financial positions of the parties involved;

(e) Whether or not the action was prosecuted or defended, in whole or in part, in bad faith;

(f) Whether or not issues of fact determinative of the validity of a party's claim or defense were reasonably in conflict;

(g) The extent to which the party prevailed with respect to the amount of and number of claims in controversy;

(h) The amount and conditions of any offer of judgment or settlement as related to the amount and conditions of the ultimate relief granted by the court.

Relating the above factors to the facts of this case militates against any award of attorneys fees.

4. Consideration of Rule 41(d), C.R.C.P.

The dismissal of this action was requested pursuant to Rules 11 and 41 of the Colorado Rules of Civil Procedure. One of the express terms of Rule 41 addresses yet

another alternative for the Court in imposing costs of a previously dismissed action. Pursuant to Rule 41(d):

> If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

The foregoing provision explicitly recognizes that imposition of terms and conditions may be inappropriate absent a finding of legal prejudice to the plaintiff. The ambit of Rule 41(d) has been held to encompass fees as well. *Evans v. Safeway*, 623 F.2d 121 (8th Cir. 1980) (per curiam).

In the present case, Applicant moved to dismiss its tributary claim upon its realization that it would not consummate contracts with end users before the time of close of evidence in the trial. Nevertheless, negotiations with users continue at the present time and a subsequent tributary claim will in all probability be filed. If a subsequent claim is not filed, then the Objectors have achieved their goal and the American Rule applies, rendering any award improper. In any event, an award of fees and costs would be premature because any and all efforts in opposing the tributary claim will be directly useful and applicable in opposition in any subsequently filed tributary claim by Applicant or other party. Pursuant to Rule 41(d), if the Court contemplates awarding fees and costs in this voluntary dismissal action, it should do so only when a subsequent tributary claim is filed. In any event, any

award eventually made could not include amounts attributable to work or efforts useful in opposing a subsequent claim.

5. Awards Based Standard of Reasonableness.

Finally, the Court is restricted to time *reasonably spent* as compensable, not time *actually spent*, and that time spent which was subsequently useful is not compensable. *McLaughlin, et al. v. Cheshire*, 219 App. D.C. 257, 676 F.2d 855 (1982). As discussed *infra*, the reasonableness of an award in the present case raises factual issues upon which there has been no discovery or record established before this Court. Given the amount to be claimed, full development of the reasonableness of any award is especially mandated in this case. *See Silberman v. Boyle*, 683 F.2d 62 (3rd Cir. 1982); and *Fitzpatrick v. I.R.S.*, 665 F.2d 327 (11th Cir. 1982).

C. Applicant's Reply to Objectors' Response.

1. Entitlement is Disputed.

Objectors state that Applicant's motion merely reargues the correctness of the Court's prior ruling to award costs and fees, presumably including attorneys fees, in this matter. In fact, Applicant's motion argues that it is both improper and erroneous to award attorneys fees or costs in the present circumstance, because to do so would be in clear contravention of the American Rule, Applicant's compliance with Colorado's language in Rule 11, C.R.C.P., and the statutory scheme established in the Colorado Revised Statutes at § 13-17-102, *et seq.* The

Objectors' reliance on federal case law is inappropriate in the face of the clear, unequivocal language of Colorado Rule 11 and Colorado statutes, the enactment of which was subsequent to the adoption of Rule 41(a)(2) and which provisions preempt any basis for holding that Rule 41 can act as an independent ground for an award of attorneys fees.

2. Due Process is Required.

Objectors allege that the right to an evidentiary hearing in such matters is without foundation. This is a bewildering statement in that there is a significant body of law which unequivocally states that a fee opponent is entitled to due process of law including a full evidentiary hearing, as well as the right to inquire and discover the efficacy and relevancy of the fee claim being made. This legal right is discussed in detail with supporting case law at Part D, below. Contrary to Objectors' allegation, all the cases cited below in fact concern actions for awarding fees and costs.

Objectors further allege that to have a procedure which would guarantee due process of law would only protract and complicate these already costly proceedings. In reply, first, the issue of an award of costs and fees as terms and conditions for the dismissal of the tributary claim is a separate matter from the presently ongoing water court trial. It is essentially a trial on a claim for damages by the Objectors. Second, the due process sought by Applicant need be neither unnecessarily extensive nor costly, but it must reflect the complexity of

having to allocate costs between nontributary and tributary claims, as well as the magnitude and reasonableness of such claims. Objectors essentially argue that expediency takes precedent over a fair and just resolution of the matter.

3. Objectors Misstate Purpose of Rule 41(a)(2), C.R.C.P.

Objectors allege that the purpose of Rule 41(a)(2), C.R.C.P., is for the protection of Objectors. In the present case, the Court has determined that no legal prejudice will inure to the Objectors because it dismissed the tributary claim without prejudice. The cases cited by Objectors are cases wherein the courts attempted to protect defendants from legal harm, not to award fees because plaintiffs sought a voluntary dismissal.

Objectors assert that Rule 41(a)(2) grants the Court a basis independent from other rules of civil procedure or from the Colorado statutes for the Court to award attorneys fees. First, Rule 41(a)(2) provides a court with the power to impose terms and conditions in the event of a voluntary dismissal of a claim in order to avoid legal prejudice to the Objectors. No legal prejudice will occur to Objectors as a result of the dismissal of the tributary claim. In fact, dismissal of the tributary claim was the clear goal of the Objectors in filing statements of opposition to American Water's application. Thus, instead of legal prejudice, legal protection has been achieved. Rule 41(a)(2) stands *in pari materia* with other rules of civil

procedure and with those statutes which specify the substantive requirements necessary to impose costs and fees in certain circumstances.

We've been unable to find, and Objectors have not cited, any cases where voluntary dismissal was the sole basis for the award of fees and costs. In every such instance where fees were awarded, there were underlying grounds such as legal prejudice or vexatious behavior. The mere fact that a party incurs attorneys fees and expenses in defending a lawsuit does not entitle the party to an award of fees. *Aggregates, Inc. v. Kruse,* 134 F.R.D. 23 (D. Puerto Rico 1991).

Objectors are correct in stating that voluntary dismissal under Rule 41(a)(2) is not accompanied by a statutory directive for the award of attorneys fees and costs. (Refer to Objectors' Response.) Without such an independent substantive basis for making an award of fees as an exception to the American Rule, no attorneys fees can be awarded contrary to provisions of Rule 11 and § 13-17-102. Subsection (5) and the rule require that *no* attorneys fees shall be assessed in this case.

4. Procedure Requires Evidentiary Hearing.

The cases upon which Objectors rely for their contention that no evidentiary hearing is required are distinguishable legally, and involve factual situations readily distinguishable from those of the present case.

In *San Juan Products, Inc. v. San Juan Pools of Kansas, Inc.,* 849 F.2d 468 (10th Cir. 1988), a trademark contest under 15 U.S.C. § 1125(a), the U.S. District Court for the

District of Kansas found that plaintiff's action was "utterly frivolous" and awarded attorneys fees and costs to defendants. In absence of a statutory provision for frivolous and groundless action like the Colorado statute, the trial court was compelled to exercise its equitable power to award fees to punish the plaintiff under the "bad faith" exception to the American Rule. There is no reference to Rule 54(d) which deals only with costs, not attorneys fees.

> The court awarded attorney fees based on its inherent equitable power. We presume the court was relying on the recognized exception to the American Rule, *see Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975), that when an unfounded action is brought or maintained in bad faith, wantonly, vexatiously or for oppressive reasons, the court may arm itself with "the power of the equity judge to do justice." 6 J.Moore, *Federal Practice* ¶ 54.-78[3], at 500 (2d ed. 1987). We have stated that to fall within the bad faith exception the claim must be entirely without color and asserted wantonly, "for purposes of harassment or delay, or for other improper reasons." *Sterling Energy, Ltd. v. Friendly Nat. Bank*, 744 F.2d 1433, 1435 (10th Cir. 1984) (quoting *Browning Debenture Holders' Committee v. DASA Corp.*, 560 F.2d 1078, 1088 (2d Cir. 1977)).

San Juan, 849 F.2d at 476. This case supports Applicant's position that to award or justify an award of attorneys fees there must be an underlying statute or a recognized exception to the American Rule before fees may be awarded.

Objectors also rely on this case to assert that it is not an abuse of discretion to determine an amount of an award in an "in-chambers" hearing. But a review of the facts indicate that in this case due-process was afforded:

> On appeal, San Juan objects to the manner and substance of the award of attorney fees. San Juan contends the court awarded the entire amount of fees requested without holding a formal, noticed hearing in open court. The record contradicts this assertion.

San Juan, 849 F.2d at 475.

In *San Juan*, the fee-opponent had over five months to contest the plaintiff's claim. *San Juan*, 849 F.2d at 475-476. Presumably, the ability "to contest" the claim included the right to seek clarification and verification of items contained in the claim through discovery. Having failed to capitalize on this opportunity, the Court found that San Juan's due process rights were not violated.

Objectors next claim that fee awards may be made based on affidavits and memoranda, without discovery or hearing, citing *Radiant Technology Corp. v. Electrovert USA Corp.*, 122 F.R.D. 201 (N.D. Tex. 1988). However, *Radiant Technology* is not analogous to the present situation. *Radiant Technology* involved a patent infringement claim wherein a virtually identical suit had been filed in a different district and dismissal was sought of the initial action. However, *Radiant Technology*, a decision by a Texas U.S. District Court, appears to be aberrant based on the Court's own acknowledgement in n. 5 on page 204 that it does follow the convention in other jursidictions [sic]. The amount at issue appeared to be minimal because parallel actions were pending and work in cases would be

applied in the other cases. Also, the Court provided an unusual smorgasbord of remedies, including some with no fees. The opinion does specifically reference the Lanham Act as a basis for awarding fees, which contains various provisions for awarding fees. 15 U.S.C. §§ 1117, 1120. To the extent the opinion suggests that a hearing is not necessary, it is contrary to all other law on the subject, and even the Objectors do not suggest that this Court forego an evidentiary hearing altogether as the Texas court did.

As discussed in Applicant's Motion and this Reply, substantial monetary amounts, material factual disputes, and a request for a hearing are precisely the types of factors that *mandate* a hearing. Furthermore, there is no way of knowing what the courts involved in cases cited by Objectors would have done had complexities such as those present here been presented to them in affidavits. The legal holdings consistently were that terms and conditions of a dismissal are designed to alleviate legal prejudice or legal harm.

Finally, Objectors assert that they do not object to the procedure used in *Shulley v. Mileur,* 115 F.R.D. 50 (M.D. Pa. 1987). There the court granted the fee claimant 20 days to submit the customary itemization, and the fee opponent was allowed 15 days to respond to the reasonableness of the amount. The *Shulley* case involved wrongful interference with a franchise option. A conditional dismissal was granted whereby the fee opponent could have proceeded to trial had it been dissatisfied with the award. The legal holding was directed towards the issue of legal prejudice and prevention thereof. There is no indication that *Shulley* involved a substantial

amount, material factual disputes, or a request for a formal hearing.

Objectors assert "[t]he Court will be supplied with adequate information in the form of affidavits and billing statements prior to the hearing, and Applicant will have an opportunity to question Objectors concerning the nature and extent of matters for which payment is sought." (Objectors' Response.) Certainly, the Court should not rely on one party's definition of the adequacy of the information supplied. But, accordingly Objectors allow that Applicant will have an "opportunity to question" on the information supplied. For questioning to be effective, the responses must be made under oath. For the information about billings to be adequate, each billing claimed must withstand inquiry about its reasonableness under the circumstances, its relationship to the tributary claim, its utility in defending against Phase I or Phase II of the nontributary claim, whether it contributes to "legal prejudice" against the Objector, and whether the expense was necessary given the scope and status of Applicant's claim at the time the expense was incurred. All the cases cited by the Objectors lack the complex allocation and other factual issues present here.

D. Full Evidentiary Hearing Needed to Determine Reasonableness of Amounts Claimed.

1. Material Factual Issues Are Disputed.

Any award of fees and costs must be predicated upon a reasonable basis. A degree of scrutiny is required to establish reasonableness. Because of the complex facts,

allocation between claims and the substantial amounts of fees and costs involved in the present case, a high degree of scrutiny is required.

At a minimum, such scrutiny would require analysis of the following:

- Whether time claimed is reasonable; what time was reasonably spent in defending the tributary claim that was not useful in the case that proceeded to trial.
- At what point in time did the Objectors subjectively believe that Applicant could not prevail on its tributary claim.
- Any duplication of effort (especially as more than one attorney is involved in this case).
- Establishing reasonable local rates for attorneys, paralegals, expert witnesses, etc.
- Whether the time spent in preparation of pleadings or discovery will be useful in Phase II of this case or other similar cases, subsequently filed by Applicant or others.
- Whether non-legal chores were performed by legal staff and the appropriate rate therefor.
- Whether the entire fees sought were actually imposed upon the Objectors' clients.
- Whether the Objectors are able to produce contemporaneous time records or are relying on reconstructed time records.
- The novelty of the case involved.
- Whether discovery procedures employed were reasonable.

- The Objectors' counsel's charges for clients in other similar actions.
- Scrutinization of expert witness fees, including the issue of whether expert witness testimony was justified.
- Whether the hourly rates claimed have changed as the litigation has been protracted over a number of years.
- Whether any of the tasks performed by attorneys could have been performed by law clerks or paralegals.
- Whether Objectors are entitled to any fees incurred after they became aware of the nonexistence of the "end" contracts necessary for a tributary claim (refer to discussion of duty to mitigate *infra*).
- Whether there was any overlap on the time spent on the tributary and nontributary claim.
- Background and qualifications of the Objectors' experts.
- How much of the time billed was spent on "nonessential" tasks (i.e., travel and telephone).
- Whether the present employment of the Objectors' counsel has led to any other employment.
- Whether Objectors' counsel bills by quarter-hours or tenth-hours.
- Whether any work billed for was based other than on an hourly rate.

The foregoing list is a clear indication of the number of factual issues involved which could be in dispute. An evidentiary hearing *must* be held when questions of material fact are disputed in a fee application. *Silberman v. Boyle*, 683 F.2d 62, 64 (3rd Cir. 1982); *Fitzpatrick v. I.R.S.*, 665 F.2d 327, 332 (11th Cir. 1982). This is especially true in cases of the magnitude and complexity of the instant case. *See Moore v. Mathews and Co.*, 682 F.2d 830 (9th Cir. 1982).

Examination of the fees and costs incurred in defending the tributary claim raises a host of factual issues upon which no discovery has been had. As stated, it is not actual time spent, but reasonable time spent that is compensated. Therefore, in order for any award to properly be made it must be determined what time was reasonably spent in opposing the tributary claim.

2. Objectors Failed to Mitigate the Fees and Costs in Defending the Tributary Claim.

Applicant maintains that the Objectors have failed to mitigate their fees and costs and have needlessly allowed them to escalate. An attorney fee applicant is charged with an affirmative duty to mitigate the attorneys fees incurred in an action. By failing to do so, the fee-applicant is subject to having its claim for fees substantially reduced or denied. This principle is well recognized in both the Colorado and federal courts.

The trial court in *Ruffing v. Lincicome*, 737 P.2d 440 (Colo. App. 1987), concluded that the full amount of attorneys fees requested by the defendant should not be allowed because he *could have mitigated* such fees by

terminating the litigation prior to trial via summary judgment. The trial court reasoned that, given the facts of the case, the defendant would almost certainly have prevailed on such a motion. By failing to file a motion for summary judgment, the defendant incurred attorneys fees far in excess of the amount reasonably necessary to defend the claims against him. On appeal, the defendant argued that the concept of mitigation could not be applied to reduce the amount of attorneys fees sought by a party even though the party has reason to believe early on in the proceedings that a particular claim asserted by an opponent is meritless. The Court of Appeals disagreed:

> [I]t is within the discretion of the trial court to limit its award of attorney fees based on a finding that a party did not take all reasonable measures to extricate himself from a frivolous or groundless lawsuit at the earliest possible time.

Ruffing, 737 P.2d at 442.

In this case it is clear from statements made by John R. Hill, counsel for U.S. Department of Justice, at the time Applicant made its motion to dismiss its tributary claim, that it was always the intent of the Objectors to litigate the tributary claim so as to end this issue forever "on the battlefield while you have them decisively engaged rather than let them get away to fight another day." Transcript of pretrial hearing on October 10, 1991, at pp. 53-54, attached as Exhibit A. In *Ruffing* the defendant also challenged the lower court's ruling on the basis that it improperly allowed the trial court to invade the province of counsel to decide how a case should be tactically

managed. The Court of Appeals pointed out, however, that:

> A party does not have an absolute right to attorney fees incurred, but rather is entitled only to the reasonable attorney fees which the court, in its discretion, deems just. Thus, there is no guarantee, regardless of how a case is managed, that attorney fees will be awarded. The result the trial court reached in this case merely encourages counsel to consider the most expeditious alternatives when making strategic decisions.

Ruffing, 737 P.2d at 442. This same principle is additionally recognized in § 13-17-103(1), C.R.S., which mandates consideration of any effort made to dismiss or reduce the number of claims asserted. The fact that the Objectors chose to litigate the tributary claim rather than mitigate their fees and costs prevents an award of fees and costs that could have been mitigated. *See Thomas v. Capital Security Services, Inc.*, 836 F.2d 866 (5th Cir. 1988), where the court discussed, at length, the rationale underlying the mitigation principle as applied to attorneys fees:

> Permitting or encouraging the opposing party to litigate a baseless action or defense past the point at which it could have been disposed of tends to perpetuate the waste and delay which the rule is intended to eliminate. It also undermines the mitigation principle which should apply in the imposition of sanctions, limiting recovery to those expenses and fees that were reasonably necessary to resist the offending paper. In assessing the damage done, the court should consider the extent to which it is self-inflicted due to the failure to mitigate. If a baseless claim could have readily been disposed of

> by summary procedures, there is little justification for a claim for attorneys' fees and expenses engendered in lengthy and elaborate proceedings in opposition. The rule's purpose would be frustrated if it encouraged the offended party to play the very game at which it is aimed.

Thomas, 836 F.2d at 879, n. 19. *See also Leffler v. Meer*, 936 F.2d 981, 987 (7th Cir. 1991); *Jackson v. Law Firm of O'Hara, Ruberg, et al.*, 875 F.2d 1224, 1230 (6th Cir. 1989), *reh. denied* (1989); *Napier v. Thirty or More Unidentified Federal Agents*, 855 F.2d 1080, 1092 (3rd Cir. 1988); *Oliveri v. Thompson*, 803 F.2d 1265, 1280 (2nd Cir. 1986), *cert. denied*, 480 U.S. 918 (1987).

3. A Party has a Further Duty to Mitigate Costs by Focusing on the Elements of the Claims.

The Objectors had a duty to mitigate costs by not over-staffing, over-researching, or over-discovering in this case. *See White v. Gen. Motors Corp., Inc.*, 908 F.2d 675 at 684 (10th Cir. 1990), *cert. denied*, 1991 U.S. LEXIS 612 (1991). *See also Leffler*, 936 F.2d at 987. The Objectors are not entitled to recover attorneys fees and costs resulting from abusive discovery procedures employed by Objectors to accomplish goals unrelated to the opposition to Applicant's application. For example, Objectors deposed any potential investors contacted by Applicant under the guise of the "can and will" test, but the transcripts of the depositions reveal that they were used to deliver what Objectors considered adverse aspects of Applicant's project and the magnitude and intensity of the opposition, all to discourage investors from participating in the project. Attorneys fees and costs must be related only to the

presentation of meritorious defenses against Applicant's claims. *See Leffler, supra* at 987.

Although cited cases deal with an invocation of a trial court's authority to impose attorneys fees pursuant to statute (§§ 13-17-101, *et seq.*, C.R.S.) or court rule, the reasoning applied in these cases is applicable to any situation where an assessment of a "reasonable amount" of attorneys fees must be made. *See Ruffing*, 737 P.2d at 442 (§ 13-17-101, C.R.S., only allows award of "reasonable" attorneys fees); *White*, 908 F.2d at 684 (Rule 11 limited to payment of opposing party's "reasonable" expenses). Accordingly, the duty to mitigate attorneys fees applies to all claims for or awards of such fees, regardless of the basis for such claim or award.

III. CONCLUSION

Rule 41(a)(2), C.R.C.P., does not establish an independent basis for an award of attorneys fees and costs. Colorado follows the American Rule, absent an express statutory or contractual provision, neither of which are present in this case. Moreover, in the present case, Colorado Rule 11 specifically precludes an award of attorneys fees. In the event that the Court were to make a finding contrary to the American Rule and award fees and costs, said award must be just and reasonable. Reasonableness in a complex case such as this can only be determined through a full evidentiary hearing after discovery procedures have been conducted.

WHEREFORE, Applicant American Water Development, Inc., respectfully requests this Court to grant its request for due process including a full evidentiary hearing.

RESPECTFULLY submitted this 22nd day of November, 1991.

SAUNDERS, SNYDER, ROSS
& DICKSON, P.C.

By /s/ Jack F. Ross
Jack F. Ross, #182
William J. Kirven III, #185
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ATTORNEYS FOR APPLICANT
AMERICAN WATER
DEVELOPMENT, INC.

EXHIBIT A

(Excerpt from Transcript of October 10, 1991 Hearing)

* * *

MR. HILL: Thank you, Your Honor. Your Honor, the United States agrees with the position taken by the district and by the water users in all respects, and the United States also expressly reserves a right to pursue whatever remedies may be available under Rule 11.

I'd like to just address very briefly the argument that the applicants make in the brief they filed this morning on the issue of our failure to mitigate damages and any quote from a letter that I wrote to Mr. Ross saying that in

my opinion they were speculating when they started and they were still speculating, so we weren't interested in conducting any negotiations with them.

[p. 54] The point is that we did want a decision on the merits of the impact of their proposal on the federal interests in the Valley just as the other water users in this valley wanted a decision on the merits. So we didn't file a dispositive motion because a dismissal with prejudice, as has been discussed already, may not preclude them from coming back.

So it's perfectly legitimate to destroy the enemy on the battlefield while you have them decisively engaged rather than let them get away to fight another day. So any of this argument on cases that we had somehow a duty to mitigate damages is completely distinguishable by the fact that this is a water case, and the notion of a dismissal with prejudice doesn't necessarily mean what it means in an ordinary civil action, thank you, Your Honor.

* * *

EXHIBIT B

DISTRICT COURT, WATER DIVISION 3, COLORADO

Case No. 86CW46

OFFER OF PROOF IN SUPPORT OF APPLICANT'S REPLY BRIEF AND MOTION REQUESTING DUE PROCESS

CONCERNING THE APPLICATION FOR WATER RIGHTS OF AMERICAN WATER DEVELOPMENT, INC.,

IN ALAMOSA, CONEJOS, COSTILLA, HINSDALE, MINERAL, RIO GRANDE AND SAGUACHE COUNTIES.

Applicant American Water Development, Inc. (hereinafter "American Water" or "Applicant") by and through its attorneys, Saunders, Snyder, Ross & Dickson, P.C., hereby submits this Offer of Proof pursuant to Rule 103 of the Colorado Rules of Evidence and respectfully provides the following information by way of its Offer of Proof in support of Applicant's Motion (the "Motion") requesting due process and Applicant's appendant Reply Brief. In its offer of proof, Applicant would show unto the Court as follows:

A. Justification for Denial of Fees and Costs:

Purpose of Offer: Pursuant to Rule 11 C.R.C.P. and § 13-17-102 6A C.R.S. (1982), no attorneys' fees shall be assessed if a party or its attorney files a voluntary dismissal within a reasonable time after learning that he would not prevail on a claim or action. American Water

withdrew its claim within a reasonable time after it determined it could not meet the statutory requirements to perfect its intent to appropriate by the close of evidence on its case in chief. The evidence offered by American Water will support its compliance with the standards mandated by both the statute and the rule.

The statute and rule cited above together with applicable case law require an evidentiary hearing in order for the Court to make a factual determination as to whether such an award may lawfully be made in these proceedings. That law requires this Court first to determine whether Applicant's withdrawal was filed within a reasonable time after it first became aware that it could not produce evidence upon which it could prevail on its tributary claim by the close of its case. Should the Court, after reviewing the relevant evidence, hold that such a withdrawal was not timely, it must make a further factual inquiry to determine whether those who claim the right to receive such fees and costs could have avoided incurring them, and if so, whether they failed and refused to take timely avoidance action on their own behalf. If they could have, but did not, their claim would also be defeated.

In support of its position that its withdrawal was timely, Applicant makes the following offer of proof:

1. If the witnesses Dale Shaffer and Robert C. McWhinnie are permitted to testify, the substance of their testimony will be:

a. That Applicant had negotiated over a considerable period of time in good faith with representatives of

a number of entities, including Jefferson County, Colorado and the City of Broomfield, Colorado for the execution of contracts Applicant believed would evidence statutory intent and in good faith, Applicant expected that such contracts could be executed prior to the close of Applicant's evidence at trial.

b. That as a result of discussions with the Board of County Commissioners of Jefferson County on September 18, 1991 and discussions with the City Council of the City of Broomfield on September 24, 1991, Applicant concluded that although Jefferson County and Broomfield had determined they wanted to enter into appropriate contracts with Applicant, the time required to resolve the complexities of a final agreement prior to execution would necessarily extend beyond the close of Applicant's evidence on Phase I of its application.

c. That within eight (8) days after the discussion with the Jefferson County Commissioners and within two days after the discussion with the Broomfield City Council Applicant authorized its Counsel to file its Motion to Withdraw its tributary claim. Such filing was within a reasonable time as required under § 13-17-102, 6A C.R.S. (1987) and Rule 11 C.R.C.P.

2. If an expert witness (to be determined) who will be a lawyer admitted to practice in Colorado who qualifies as an expert in the area of attorney fees and costs is permitted to testify, the substance of his testimony will address: 1) the reasonableness of the time of filing of Applicant's Motion to Withdraw its tributary claim; 2) the right of Applicant to rely on the plain language of Rule 11, C.R.C.P. and the clear intent of § 13-17-102 6A C.R.S.;

and 3) the right of Applicant to have an evidentiary hearing on the issues of both entitlement and reasonableness with adequate time for discovery to prepare for said hearing.

3. The foregoing testimony is material and competent and clearly relevant in that it relates to Applicant's compliance with statutory criteria. The testimony confirms that Applicant moved to dismiss its tributary claim within a reasonable time after Applicant concluded it would not prevail on its tributary claim and filed its motion to dismiss, taking into consideration Rule 11, C.R.C.P. and § 13-17-102, 6A C.R.S. (1987). Further the testimony will show that Applicant and its counsel reasonably relied upon the rule and statute as applicable to the withdrawal of Applicant's claim.

4. This Offer of Proof is made in writing as part of Applicant's Reply Brief to reveal the substance of the offered evidence to support Applicant's argument that the award of fees and costs in this instance would be contrary to Rule 11 and § 13-17-102(5), C.R.S., as such an award is an improper term and condition for the entry of an order granting Applicant's Motion to Withdraw its tributary claim since Applicant's Motion was timely filed and was in compliance with said rule and statute.

B. Objectors' Duty to Mitigate and Refusal to Do So:

The Objectors knew that contracts for perfecting the appropriative intent did not exist and if they believed in good faith that such a condition would defeat the Applicant's claim, the Objectors had a duty to mitigate their preparation costs by seeking dismissal of the claim through motion practice.

In support of its position that the Objectors knew of the lack of contracts, Applicant makes the following Offer of Proof:

1. If the witness Dale Shaffer is permitted to testify, the substance of his testimony will be:

a. That at a Colorado Water Congress annual meeting on or about January 28 and 29, 1988, in a conversation with Mr. John U. Carlson, attorney for the Rio Grande Water Users Association, Mr. Carlson stated that American Water was a speculator, that it did not have the necessary contracts, that the adjudication would go all the way through and make a lot of money for Mr. Carlson's law firm but that American Water would not get a drop of water from the proceedings.

2. Various discovery responses to interrogatories posed by both Objectors and Applicant show that the Objectors knew as early as March 30, 1988, and were reminded as late as October 9, 1991, that Applicant did not have such contracts to sell water and elected to use this fact at trial rather than as basis for summary judgment or other motion or action prior to trial; to wit: Pertinent responses of Applicant to specific interrogatories of Objectors as specified and responses of certain Objectors to specific interrogatories of Applicant are highlighted in the discovery responses attached hereto as Exhibits A, B, C, D, E and F and made a part hereof.

a. The earliest example of such discovery responses is taken from Exhibit A, being Applicant's responses to Objectors' Rio Grande Water Conservation

District's and Rio Grande Water Users Association's Second Set of Interrogatories and Request for Production of Documents dated January 26, 1988.

(1) Interrogatory No. 51: State whether there is any agreement of any kind between AWDI and BRC concerning BRC's use of TWSC Water outside the boundaries of the Baca Ranch and, if so, identify each such agreement and each document concerning each such agreement.

RESPONSE: No.

(2) Interrogatory No. 52: State whether there is any agreement of any kind between any persons, whether or not including the Applicant, concerning the transportation or distribution of Application Water and, if your response is anything other than an unqualified negative, identify each such agreement and each document concerning each such agreement.

RESPONSE: No.

(3) Interrogatory No. 53: State whether there has been development by or for the Applicant of any plan or proposal for the transportation or distribution of Application Water to places of beneficial use.

RESPONSE: As to Applicants' claim for tributary conditional water rights (Part IV of the Application), Applicants state that there has been no such development.

Date of response: March 30, 1988.

b. An interim example of such discovery responses is taken from the Rio Grande Water Users

Association's response to the Applicants' prior Discovery Requests. (Exhibit E hereto) as follows:

(1) Interrogatory No. 16. Regarding the allegations contained in your Statement of Opposition dated February 23, 1987, state the following: . . .

F. Each and every fact and reason why you allege that the Application is speculative.

(2) Supplemental Answer to Interrogatory No. 16F. The Applicant has no fixed and definite plan for the diversion of a specific amount of water for beneficial use, has no established use for the water claimed, and has no contractual commitments for the purchase of said water by others who will apply it to beneficial use. . . .

Date of response: February 12, 1990.

3. Not only were the Objectors aware of the lack of such contracts, they were making vigorous efforts to dissuade others from entering into such contracts. In response to requests to produce, the Rio Grande Water Conservation District produced copies of three letters sent for that very purpose to Denver Metropolitan area water providers, dated December 11, 1989 (see Exhibit G), August 23, 1990 (see Exhibit H), and February 21, 1991 (see Exhibit I).

4. During the latter part of January and early February, 1991, depositions by the Objectors also developed information about the then lack of contracts (see Exhibits J, K and L).

5. Finally, the litigation strategy of Objectors, most clearly articulated by Mr. John Hill, counsel for the

United States, was to refuse to seek to have the case resolved other than by a full scale trial.

In letter from John R. Hill, Jr., attorney for United States Department of Justice dated November 19, 1990 regarding this case (86CW46 Water Division No. 3) to Jack F. Ross, attorney for Applicant in which John R. Hill states as follows:

> Finally, and most important, I believe AWDI's application was speculative when filed and continues to be speculative. Despite being requested to do so in discovery, AWDI has failed to disclose or produce a single contractual commitment to use the water it proposes to transport to the Front Range. Therefore, as a matter of Colorado law, AWDI has no water rights for the court to confirm in these proceedings. It makes no sense to me whatever to negotiate over so-called "protective measures" to be included in a decree the prospects for which are extremely remote.
>
> It is in the foregoing context that I adhere to my position that negotiations would be fruitless and that the federal interests will be best served by defeat of the application.

The full text of that letter, together with the one to which it responds and the statement by Mr. Hill in corroboration of that position in open Court on October 10, 1991, are attached as Exhibits M, N and O.

6. If the persons answering the interrogatories in Exhibits A, B, C, D, E and F, the deponents in Exhibits G, H, I, J, K and L, and the managing agents of the Objectors are permitted to be examined or cross examined by Applicant under the rule (Rule 611(c) C.R.E.), as circumstances permit, the substance of their testimony will show

that the Objectors knew as early as March 30, 1988 and as late as October 9, 1991 that Applicant did not have any water contracts and elected to deter the use of this fact until trial on the Applicant's tributary claim in an effort to finally dispose of it rather than seek its pretrial dismissal on a motion for summary judgment or otherwise.

7. The foregoing evidence is material and competent and clearly relevant in that it relates to Objectors' knowledge regarding the existence of Applicant's water contract status and Objectors' failure to mitigate because of their election to pursue resolution of Applicant's tributary claim through litigation and not through summary judgment or other pretrial motion or proceeding.

8. This Offer of Proof is being made in writing via this attachment to Applicant's Reply Brief to show that an evidentiary hearing is necessary and that the offered evidence supports the Applicant's argument that the Objectors failed to mitigate their damages and developed their evidence regarding the tributary claim according to a plan of action to pursue resolution of the tributary claim through litigation and not through a motion for summary judgment or other pretrial motion or proceeding.

C. In general this Offer of Proof is sufficiently specific and made in good faith such that producing the proposed witnesses is not necessary until this Court has ruled on Applicant's motion requesting due process and an evidentiary hearing on the matter of attorneys fees and costs.

Respectfully submitted this 22nd day of November, 1991.

DISTRICT COURT, WATER DIVISION 3, COLORADO

Case No. 86-CW-46

TRANSCRIPT OF PROCEEDINGS VOLUME XXIX

November 22, 1991

CONCERNING THE APPLICATION FOR WATER RIGHTS OF:

AMERICAN WATER DEVELOPMENT, INC., THE BACA RANCH COMPANY AND THE BACA CORPORATION, IN SAGUACHE COUNTY.

BE IT REMEMBERED that the above-entitled matter came on for trial on the 22nd day of November, 1991, before the HONORABLE ROBERT W. OGBURN, sitting in Water Division Three, Alamosa County, Colorado.

APPEARANCES:

For Applicants American Water Development, Inc., The Baca Ranch Company, and The Baca Corporation:

JACK F. ROSS, ESQ.
DAVID C. HALLFORD, ESQ.
THOMAS S. CRABB, ESQ.

* * *

THE COURT: Are we ready to proceed with the motion concerning costs and fees?

MR. ROSS: The Applicant is, your Honor.

THE COURT: Mr. Ross.

MR. ROSS: May it please the Court. The [p. 6475] Applicant's reason for filing the motion first simply is that after the Court entered the order dismissing the tributary claim, it became apparent that the Court had also, in the process of making that ruling, made some findings and determinations with respect to the entitlements of the Objectors to receive fees and costs.

The arguments on the motion which were held and disposed of on October 10 dealt with the issue of whether the claim could be dismissed on the motion of the Applicant and whether doing so under the law would cause any legal prejudice or injury to the Objectors.

In granting the motion and dismissing the claim without prejudice, the Court necessarily had to find that there was no legal injury or prejudice to the Objectors by the grant of that motion.

That's all that was before the Court at that time, but we've understood from comments by the Court since then, and certainly from the comments from the bench when the matter was ruled on, that the apparent conclusion the Court had reached, without benefit of any evidentiary hearing, without benefit of the opportunity for the Applicants to present evidence to support their position, or for that matter, the Objectors to support their position, if they had one, was that they indeed were entitled to receive fees and costs; but there's no [p. 6476] factual record demonstrating that; and that as far as the Court was concerned, the only question appeared to be how much those fees and costs should be; that the amount should be determined by some sort of summary preemptive process similar to what is followed in other

matters such as domestic relations and other matters where attorneys' fees are provided for by specific statute.

And our concern was very simply that our client was thereby exposed to a substantial monetary claim without having had an opportunity for a fair trial on the merits of the entitlement of the Objectors, nor a fair trial with respect to the evidence required to see whether any of the defenses that might be available to the Applicant could be pleaded and proven. All of that was shortcut.

In fact, what appeared to be the case was that the railroad was under full head of steam and about to leave the station. We filed a motion largely for the purpose of making it possible for the engineer and for the other passengers on the train to take a second hard look at the rules of the road, not to suggest that the Court had no discretion, but rather that to avoid its abuse, the Court needed to follow certain procedures to assure to the Applicant its due process in the matter of establishing whether an entitlement existed, and if so, [p. 6477] how much it might be.

We then proceeded to point out to the Court, as we reiterate today, that under the rule under which the motion was filed and the dismissal was granted, there was not a substantive authority for the Court to impose rules, impose fees and costs against the Applicant; that the American rule with respect to fees is still alive and well in the state of Colorado, and that unless Objectors can bring themselves within an exception to the American rule or a specific statute can be identified under which those fees might be claimed, the Rule 40 itself does

not – Rule 41 itself does not provide an independent substantive basis for the award of fees and costs.

* * *

[p. 6481] . . . An out-of-hand determination that the fees and costs should be paid without any evidentiary record before it, is simply an indication that the Court has not fully considered the application of the rule or given the Applicant a fair opportunity to present the evidence which would enable it to demonstrate that the Objectors are not entitled to any such award.

And that's why, your Honor, among other reasons, we made an offer of proof today as part of our reply brief because we wanted the Court to know what [p. 6482] would happen if – at least as far as we're able to tell, if the Court were to permit a due process procedure, allow us to have a hearing, first of all, to determine the substantive right of the Objectors to receive the kind of award that they claim, that substantive hearing would require the evidence to determine whether under the statutory standard the Applicants filing was timely.

If after hearing that evidence, whatever evidence the Objectors may be able to produce to counter that, the Court should find that the request to dismiss – the motion to dismiss was not timely made under the standards prescribed by the rule and the statute, then there would still be a further evidentiary hearing required to determine whether the Objectors, having a duty to mitigate their damages – their claim of damages, had – in fact, had the information necessary to be put on notice that they might have an opportunity to mitigate their damages,

and whether having been put on notice of that, they failed and neglected to do so.

* * *

[p. 6483] If the Court, after an evidentiary hearing, is persuaded that they did not believe, however, that the validity of such a position warranted their filing motions for summary judgment in order to cut their costs and mitigate their damages, then the Court might successfully award attorneys' fees based upon the fact that they didn't need to mitigate or they couldn't have mitigated.

We believe evidence we can present and we've offered to prove will demonstrate that they, both knew that they had an opportunity, and that they deliberately chose not to cut their costs, not to reduce their exposure, but rather to carry right on up to the brink.

* * *

[p. 6484] Under those circumstances, we believe we can demonstrate with a factual record that even if the Court were to find that the Applicant's motion to withdraw was untimely, though we don't believe the Court can really find that on the real evidentiary record, but even if it did, that these Objectors cannot bring themselves within the ambit of that requirement of the law and show that they mitigated when they had an opportunity to.

All we're saying in our motion at this stage of the game is these are issues that require a due [p. 6485] process analysis. These are matters that the Court should provide for a fair hearing, an opportunity for people to develop their evidence. Obviously it will become very

important in determining these matters for the Applicants to have access to discovery, not that we choose to protract it.

Our proposal suggested that the matter be completed in 60 days; that we believe we can find out what needs to be known in order to present a proper and full record to the Court for it to make whatever determination it needs to make with respect to these claims.

* * *

[p. 6486] Our position is the Court should exercise its discretion by allowing an appropriate due process procedure so that it has a full and fair hearing before it makes any determination, and we can see this happening, your Honor, in a continuum.

There isn't any reason why if the Court follows the procedure that we think is appropriate, it can't hold a hearing on the substantive right to receive an award; and if it makes a determination on both elements that we've described here, it can then proceed to a determination of the appropriateness and to a determination of the reasonableness of any of the fees [p. 6487] that have been claimed.

But, once again, that kind of a determination, where, as the court has announced in its ruling yet today, there is difficulty in determining what evidence is appropriate for a tributary proof and what evidence is appropriate for a nontributary case proof. Surely there is going to be overlap in preparation and surely there needs to be a very careful scrutiny made of claims made for fees encountered in preparation for a tributary claim.

We believe that due process requires our ability to examine through discovery and with all the powers necessary under the Court to determine, if it gets to that point, the appropriateness of it – of any claim – reasonableness of any claim, and to permit us to be prepared for a fine, solid, evidentiary hearing to be able to provide for the Court all of the facts it needs to make a proper judgment in that matter.

If after all that is heard, the judge is persuaded that the Objectors have met the requirements of the law and awards the fees, the Court will not have abused the due process rights of the Applicant in the process of making its determination. . . .

[p. 6488] MR. ROSS: That's the reason why we filed our motion, your Honor. That's the reason we believe it's appropriate for the Court to follow these procedures. We don't see that it's going to create any special burden for these other people to come forward.

After all, it's only fair for them to say we believe you on this and here is what we've done and here is why, and we expect that to be done in a reasonable fashion and not a preemptory resort of quick access to the Court saying we got to get this, you can inquire a little bit. That isn't due process, your Honor. That's what we're after here.

* * *

[p. 6498] THE COURT: Mr. Ross.

MR. ROSS: Let there be no mistake, your Honor, the course of action chosen by the Applicants since October 10, 1991 should not be construed or misconstrued by anyone, whether it be the Court or counsel

or anyone else, as an acceptance willy-nilly of the Court's determination on that day that these Objectors were entitled – had an entitlement to receive fees and costs.

THE COURT: October 10?

MR. ROSS: October 10, I believe, was the date upon which the Court finally ruled in the second pretrial conference, and I believe that's the date on which the Court indicated it would assess fees and costs.

THE COURT: Thank you.

* * *

DISTRICT COURT, WATER DIVISION 3, COLORADO

Case No. 86CW46

APPLICANT'S REQUEST FOR PREHEARING CONFERENCE AND ORAL ARGUMENT ON ISSUE OF ENTITLEMENT

CONCERNING THE APPLICATION FOR WATER RIGHTS OF AMERICAN WATER DEVELOPMENT, INC.

IN ALAMOSA, CONEJOS, COSTILLA, HINSDALE, MINERAL RIO GRANDE AND SAGUACHE COUNTIES.

COMES NOW the Applicant, American Water Development, Inc. ("Applicant"), by and through its counsel, and requests that the Water Court schedule and hold a prehearing conference prior to the evidentiary hearing on the award of attorney fees and costs and that the Water Court hear oral argument on the issue of entitlement.

As grounds for its request, Applicant states as follows:

1. The Court, without the benefit of full briefs and argument on the issue and in reliance on federal case law, held that Rule 41(a)(2) C.R.C.P. allowed the Court to award attorney fees and costs to the Objectors as a term and condition of its dismissal of Applicant's tributary claim. Subsequently, Applicant has submitted briefs evidencing the Colorado General Assembly's adoption of an attorney fee statute which supersedes and establishes the

exclusive circumstances under which attorney fees may be awarded. Applicant has not previously had the opportunity to argue the effect of the statute and corresponding new provision in the Colorado Rules of Civil Procedure and hereby requests an opportunity to do so. The issue is a legal issue for determination by the Court, and its early determination may avoid the necessity for an evidentiary hearing, or at least the need for inclusion of the issue in the hearing. Therefore, it would be appropriate to hear the arguments of counsel at the prehearing conference.

2. The Objectors have filed claims for attorney fees and costs which collectively total approximately $2.7 million. The court has ruled that an evidentiary hearing will be necessary to determine the reasonableness of the amounts claimed by the Objectors, and that Applicant may present evidence on the associated issues which include failure to mitigate fees and costs, inclusion of nontributary fees and costs in said claims, the appropriate allocation of fees and costs to each claim, the adequacy of the description of work claimed and other issues related to the reasonableness of the claims.

3. To facilitate the hearing process, to avoid unnecessary time, expense and surprise and to narrow the issues, Applicant requests that the Court hold a formal prehearing conference. Ten days prior to the conference, each party would exchange a list of exhibits and witnesses, with a summary of testimony and lists of undisputed and disputed issues. At the prehearing conference, the Court would resolve evidentiary disputes, define the disputed legal and factual issues and order preparation of a prehearing statement to govern the conduct of the hearing. The holding of a prehearing conference will

serve the interests of judicial economy by resolving preliminary matters, resolving evidentiary disputes and providing for an exchange of exhibits and summaries of testimony. This will substantially reduce the amount of required time for the hearing. It will also facilitate making an estimate of the hearing time required, so that the hearing can be set for an appropriate length of time and will not need to be bifurcated.

Applicant requests that each party be required to attend the prehearing conference in Alamosa.

Respectfully submitted this 18th day of February, 1992.

SAUNDERS, SNYDER, ROSS
& DICKSON, P.C.

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ATTORNEYS FOR APPLICANT

DISTRICT COURT, WATER DIVISION 3, COLORADO

Case No. 86CW46

APPLICANT'S MOTION TO DISMISS CLAIM SET FORTH IN PART IV OF THE AMENDED APPLICATION

CONCERNING THE APPLICATION FOR WATER RIGHTS OF AMERICAN WATER DEVELOPMENT, INC.

IN ALAMOSA, CONEJOS, COSTILLA, HINSDALE, MINERAL, RIO GRANDE AND SAGUACHE COUNTIES.

COMES NOW the Applicant, by its attorneys and pursuant to C.R.C.P. 41(a)(2) moves the Court to dismiss the claim for relief set forth in Part IV (pp. 9-12) of the Amended Application. As grounds for its motion Applicant states the following:

1. Applicant, as a result of prior rulings in this action, and other circumstances, has now concluded that Applicant has no reasonable likelihood of prevailing on the claim set forth in Part IV of the Amended Application.

2. Judicial economy requires that Applicant withdraw its claim in Part IV of the Amended Application and that such claim be dismissed at this time.

3. Dismissal of the claim in Part IV of the Amended Application will prevent the unnecessary time and expense involved in trying the claim.

WHEREFORE, the Applicant respectfully requests that the claim set forth in Part IV of the Amended Application be dismissed at this time.

Respectfully submitted this 26th day of September, 1991.

SAUNDERS, SNYDER, ROSS
& DICKSON, P.C.

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ATTORNEYS FOR APPLICANT
AMERICAN WATER
DEVELOPMENT, INC.

DISTRICT COURT, WATER DIVISION 3, COLORADO

Case No. 86 CW 46

REPORTER'S TRANSCRIPT

CONCERNING THE APPLICATION FOR WATER RIGHTS OF:

AMERICAN WATER DEVELOPMENT, INC., THE BACA RANCH COMPANY, AND THE BACA CORPORATION, IN SAGUACHE COUNTY.

The pretrial hearing in this matter commenced on Thursday, September 26, 1991, before the HONORABLE ROBERT W. OGBURN, District Judge within and for the 12th Judicial District, State of Colorado.

* * *

MR. ROSS: Your Honor, I believe we may be able to assist the Court in shortening up some of these matters. We're filing as of this point in time a motion to dismiss the claims set forth in Part 4 of the Amended Application, as we state in the written motion.

As a result of prior rulings in this action and pursuant to Colorado Rules of Civil Procedure 41(a)(2), we move the Court to dismiss the claim for relief for the reason that we have now had to conclude yet this morning. The applicant has no reasonable likelihood on prevailing on the claims set forth on that part of the Amended Application, that is, the tributary claim, Your Honor.

And, as I point out, because of the adverse rulings that have occurred – have occurred so far, our case has essentially been so emasculated that we cannot put on a case that will have a reasonable likelihood of prevailing; and for that reason, we move the Court to dismiss that claim under the rule. And as we understand the position of the Colorado Supreme Court with respect to such motions, they are appropriate to be granted.

* * *

[p. 71] I refer the Court to *Tillery v. District Court*, a 1984 Colorado Supreme Court case which holds that it is appropriate for the Court to enter such an order. It may, on an appropriate hearing, determine terms and conditions that are just for the entry of such an order; but at this stage of the game, I believe it does indeed shorten up what the Court has to do for further pretrial activities today and can eliminate the necessity for having to put on a case for an attempt to prove up a case which can no longer be done because of the Court's prior rulings.

* * *

DISTRICT COURT, WATER DIVISION 3, COLORADO

Case No. 86 CW 46

REPORTER'S TRANSCRIPT

CONCERNING THE APPLICATION FOR WATER RIGHTS OF:

AMERICAN WATER DEVELOPMENT, INC., THE BACA RANCH COMPANY, AND THE BACA CORPORATION, IN SAGUACHE COUNTY.

The pretrial hearing in this matter commenced on Thursday, October 10, 1991, before the HONORABLE ROBERT W. OGBURN, District Judge within and for the 12th Judicial District, State of Colorado.

APPEARANCES:

FOR THE APPLICANT:

JACK F. ROSS
DAVID C. HALLFORD
THOMAS S. CRABB

FOR THE OBJECTORS:

JOHN HILL, et al.

* * *

[p. 54] MR. HILL: The point is that we did want a decision on the merits of the impact of their proposal on the federal interests in the Valley just as the other water users in this valley wanted a decision on the merits. So we didn't file a dispositive motion because a dismissal with prejudice, as has been discussed already, may not preclude them from coming back.

So it's perfectly legitimate to destroy the enemy on the battlefield while you have them decisively engaged rather than let them get away to fight another day.

* * *

DISTRICT COURT, WATER DIVISION 3, COLORADO

CASE NO. 86-CW-46

OBJECTORS' OPPOSITION TO APPLICANT'S MOTION TO DISMISS CLAIM SET FORTH IN PART IV OF THE AMENDED APPLICATION

CONCERNING THE APPLICATION FOR WATER RIGHTS OF:

AMERICAN WATER DEVELOPMENT, INC.,

IN ALAMOSA, CONEJOS, COSTILLA, HINSDALE, MINERAL, RIO GRANDE AND SAGUACHE COUNTIES.

---

* * *

A. THE COURT COULD DENY APPLICANT'S MOTION IN LIGHT OF THE INVESTMENT OF THE OBJECTORS IN DEFENDING AGAINST IT

As noted above, because of the magnitude and potential impact of the Application and Amended Application, the Objectors were forced to dedicate all available resources to this case for nearly five years. The District, for example, which was created by state statute, C.R.S. §§37-48-101, *et seq.*, has committed substantial resources to this case, both in terms of monetary resources and time and effort, since 1987. When the District's existing budget proved inadequate, the District sought and obtained the approval of the Division of Local Government of the Department of Local Affairs to increase its mill levy by

one mill in order to pay the costs of this litigation. *See* Curtis Affidavit (Exhibit A).

When even those monies proved inadequate, the District sought the approval of the taxpayers to borrow monies to pay for the cost of this litigation. *Id.* An election was held on December 11, 1990, and the electorate voted in favor of authorizing the District to borrow $472,000, the maximum permitted under state law, by a vote of 8,700 in favor and only 136 opposed. *Id.* Those funds have been borrowed and have made it possible for the District to continue funding this litigation. Even with all of that, the District has been able to effectively defend this litigation to date only because of the willingness of counsel and others to work at reduced rates and write down bills. *Id.*

Likewise the Water Users have stretched their financial resources to their very limit in an effort to defend against the claims of the Applicant. The voluntary assessments of the Water Users are at an all time high and cannot be sustained at that level. Affidavit of Bill V. Kopfman (Exhibit B). When combined with the tax levy of the District, the individual water right owners of the Water Users' members are paying two and three assessments to defray the costs of this litigation. Even these high assessments would not permit the Water Users full participation if it were not for the willingness of counsel and consultants to work at reduced rates and write-down their bills.

Thus, the prospect of a dismissal of the Applicant's Tributary Claim on the eve of trial with the potential for a new application and entirely new proceedings at some

date in the future poses a risk of dramatic prejudice to the District and other Objectors. The District has taxed and borrowed to the limit of its legal capacity to defend against the threats posed by the Amended Application. Likewise, the Water Users are at the very limit of their financial resources and their capacity to defend against the claims of the Applicant or others has been dramatically impaired.

* * *

DISTRICT COURT, WATER DIVISION 3, COLORADO

Case No. 86 CW 46

REPORTER'S TRANSCRIPT

CONCERNING THE APPLICATION FOR WATER RIGHTS OF:

AMERICAN WATER DEVELOPMENT, INC., THE BACA RANCH COMPANY, AND THE BACA CORPORATION, IN SAGUACHE COUNTY.

The fees and costs trial in this matter commenced on Tuesday, April 21, 1992, before the HONORABLE ROBERT W. OGBURN, Water Judge within and for Water Division 3, State of Colorado.

APPEARANCES:

FOR THE APPLICANT:

JOSEPH M. MONTANO
DIANE B. DAVIES
FRED CHEEVER

* * *

[p. 640] THE COURT: Well, this is a trial to the Court, and since Mr. Martz, like Mr. Moses, comes under the rubric of expert emeritus, we want to hear what he has to say. It's fun, I'd even be willing to listen to Mr. Martz talk about repairing water rights east of the Mississippi, but that probably would be going too far afield.

* * *

[p. 642] Q. (By Mr. Montano) In other words, as I understand what you were doing is you were trying to see what type of costs were essential to be incurred by the objectors?

A (By. Mr. Martz) Right.

Q In order for the proceedings to be conducted under the legislative mandate?

A Right.

Q And did you also look at summaries of witnesses?

A Yes, and summaries of exhibits, again, to address the question of what had been done especially for the tributary water issue, what was done in a area-wide political context of fighting an appropriation, but not in the adjudication proceeding process, that is, looking at what can be done to block the development of a project, which is perfectly appropriate but not in the context of assessing costs under 42(a)(2) (sic).

* * *

AFFIDAVIT OF ALISON MAYNARD

(Filed Dec. 9, 1991)

Alison Maynard, of age and duly sworn, states under oath as follows:

1. From April 1989 until May 1990, as an Assistant Attorney General for the State of Colorado, I was counsel for the state agencies which are objectors in the AWDI case in Water Division 3.

2. In the summer of 1989, I met with David Robbins, who represented the Rio Grande Water Conservation District, another objector. I asked him why he had not moved for summary judgment on the basis of speculation, or whether he had considered doing so. I drew to his attention the fact that at the end of 1988, in Water Division 4, the application of NECO, a private water development company, had been dismissed with prejudice on motion, on the basis of speculation. NECO was found to have no contracts in effect for the sale of water; in addition, Judge Brown had indicated in his opinion, as I recall, that it would be reasonable to require such contracts to be in place as of the date of application in order to overcome the charge of speculation. AWDI's situation I saw as very similar to NECO's, and I was aware that AWDI had admitted in sworn discovery responses by that time that it had no contracts in effect.

3. David Robbins became excited and exclaimed, "We have a right to litigate our own issues in this case!" He proceeded to rail against Jeris Danielson, the state engineer and one of my clients, apparently believing that

it was Jeri who was behind an attempt to file such a motion for summary judgment.

4. Not long afterwards, David Robbins met with Duane Woodard, Colorado Attorney General, without notifying me. I happened to learn that this meeting would take place from accidentally seeing written notes of a telephone conversation, indicating that the subject of the meeting was AWDI, which Lois Witte, the deputy of the natural resources section, had taken. I thus arranged to be present at this meeting, with Wendy Weiss, and David was surprised to see us. He denied that he had come to discuss AWDI, and instead related anecdotes to Duane having to do with the allegedly erratic behavior of Jeri Danielson in the Kansas v. Colorado litigation.

5. On or about September 27, 1989, Duane Woodard summoned me into his office, along with Lois Witte. He told me that John Carlson, who represented another objector, the Rio Grande Water Users Association, had informed him a bill was being sponsored in the state legislature to subordinate the state engineer to a newly created water authority, thus effectively stripping him of his powers. Duane indicated that John Carlson and David Robbins supported this bill, as they were furious with Jeri. Duane further stated that Jeri had "burned his bridges with Chips Barry, and he has burned his bridges with me." As examples of Jeri's allegedly irresponsible behavior, Duane indicated John had mentioned the state's prior response on the federal preemption motion (which in fact all the state agencies joined), and the possibility now of a motion for summary judgment in AWDI. Without soliciting my advice on the merits of filing such a motion, Duane ordered me not to file any motions in the

case henceforth. Although he permitted me to respond to discovery, Duane instructed me to "let the sleeping giant lie." I understood him to mean that the state was not to take an independent or active role in the litigation, but was to follow the initiatives made by John Carlson and David Robbins at most. Thus, no motion for summary judgment on the tributary claim was filed.

6. I am aware that, approximately 10 days before the trial began in this matter, in October 1991, AWDI moved to dismiss its tributary claim. I believe it did so because it still did not have contracts in effect, and knew itself it could not overcome the speculation charge. AWDI's motion was granted, and it was ordered to pay attorney fees to the objectors for the needless expenses they incurred in defending against that claim.

7. Although of course there would have been no guarantee that a motion for partial summary judgment on the tributary claim would have been successful, it is my opinion that the active efforts of David Robbins and John Carlson to prevent the filing of such a motion, which if successful would have shortened and possibly even ended this litigation over two years ago, should be weighed by the court in determining the award of attorney's fees which equitably should be awarded to objectors for their exertions *vis a vis* the tributary claim during that period.

/s/ Alison Maynard
Alison Maynard

Subscribed and sworn to before me this 5th day of December, 1991, in the City and County of Denver, Colorado.

My commission expires: July 2, 1993.

/s/ Genevieve A. Ratcliff
Notary Public
7039 E. 18th Ave
Address
Denver, CO 80220

SUPREME COURT, STATE OF COLORADO

Cases No. 92SA141 and 92SA 263

Appeal from District Court, Water Division 3, Case No. 86CW46

BRIEF OF APPELLANT-PETITIONER
AMERICAN WATER DEVELOPMENT, INC.

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92 SA 141

AMERICAN WATER DEVELOPMENT, INC.,
a Colorado corporation,

Applicant-Appellant,

vs.

CITY OF ALAMOSA, et al.,

Objectors-Appellees;

---

92 SA 263

AMERICAN WATER DEVELOPMENT, INC.,

Applicant-Petitioner,

v.

RIO GRANDE WATER CONSERVATION DISTRICT, et al.,

Objectors-Respondents.

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* * *

2. The Trial Court Erred in Failing to Consider the Unique Nature of a Water Adjudication.

Vast quantities of water underlie land owned by American Water in the San Luis Valley. Colorado statutes required American Water to adjudicate its interests in the

trial court in order to determine its rights to the water under its property and to put the water to beneficial use. It is the policy of this State to maximize the use of its water resources. *People v. Fellhauer,* 167 Colo. 320, 447 P.2d 986 (1968).

American Water claimed rights to nontributary groundwater. American Water also presented alternative theories entitling it to put the water to beneficial use, one of which was that American Water could appropriate the water if it was determined to be tributary in nature. American Water acted properly in presenting alternative nontributary and tributary theories to appropriate the water it sought. *City and County of Denver v. Monaghan Farms,* 807 P.2d 9, 17 (Colo. 1991).

American Water did not specify or seek out Objectors, but following statutory mandates, it gave notice in order that those who wished, could come forward voluntarily and object. § 37-92-302, C.R.S. (Addendum A at 12). The Objectors' actions in this case demonstrate the unusual freedom that an objector has in electing how it wants to pursue its objection to an application. While the law allows an objector freedom, it does not provide him with the luxury of pursuing an independent strategy at the expense of the applicant. The record demonstrates that Objectors pursued their own agenda, which went beyond addressing the effect of American Water's Tributary Claim on vested rights. As attorney for the U.S. commented, in explaining why he had not filed a dispositive motion on the Tributary Claim:

> The point is that we did want a decision on the merits of the impact of [American Water's application] on the federal interests in the Valley

> just as the other water users in this valley wanted a decision on the merits. So we didn't file a dispositive motion because a dismissal with prejudice, as has been discussed already, may not preclude them from coming back.
>
> So its perfectly legitimate to destroy the enemy on the battlefield while you have him decisively engaged rather than let them get away to fight another day.

V. 40, p. 54, l. 1-9.

An affirmance of the trial court's decision will have a chilling effect upon future applicants who wish to exercise their constitutional right to appropriate water. Once an application is filed, "any person who wishes" may file a statement of opposition, without complying with traditional standing requirements. *See Bunger v. Uncompahgre Valley Ass'n*, 557 P.2d 389 (Colo. 1976); § 37-92-302(1)(b), C.R.S. An applicant has no control over the number of objectors who participate in an action, or the fees and costs they may generate in pursuing their own ends. Thus every potential applicant, regardless of its size or financial resources and its potential for successful completion of its appropriation, would have to consider whether to file its application in view of the possibility that unforeseen circumstances, raised by unforeseen objectors, or adverse pretrial rulings, might require voluntary dismissal of the application. If the trial court's application of 41(a)(2) is upheld, such dismissal could routinely be accompanied by the imposition of attorney fees and costs, wholly outside the applicant's control, without regard to whether the application was frivolous, or whether it was pursued in good faith.

Colorado Uniform Water Court Rule 5(b) reflects the distinction between water court proceedings and other civil actions. Paralleling Rule 41(a)(2), Water Court Rule 5(b) requires court approval for withdrawal of an application for water rights if a statement of opposition has been filed. Rule 5(b), however, makes no provision for "terms and conditions."

* * *

SUPREME COURT, STATE OF COLORADO
Cases No. 92SA141 and 92SA263
Appeal from District Court, Water Division 3,
Case No. 86CW46

REPLY BRIEF OF APPELLANT-PETITIONER AMERICAN WATER DEVELOPMENT, INC.

---

92 SA 141

AMERICAN WATER DEVELOPMENT, INC.,
a Colorado corporation,

Applicant-Appellant,

v.

CITY OF ALAMOSA, et al.,

Objectors-Appellees;

---

92 SA 263

AMERICAN WATER DEVELOPMENT, INC.,

Applicant-Petitioner,

v.

RIO GRANDE WATER CONSERVATION DISTRICT, et al.,

Objectors-Respondents.

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* * *

IV. THE TRIAL COURT'S ORDERS ALLOWING FEES AND COSTS SHOULD BE REVERSED.

In order to determine its rights to the water under its property, AWD was required to adjudicate its interests in the water court. AWD did not seek out Objectors but, following statutory mandates, gave notice so that those who wished to could object. C.R.S. 37-92-302. Objectors are not defendants in this lawsuit. AWD did not sue them. Objectors have not disputed that they voluntarily entered this litigation.

* * *

The trial court erroneously imposed terms and conditions under Rule 41 on the withdrawal of the Tributary Claim without prejudice, ignoring Rule 11 and C.R.S. § 13-17-102(5). The trial court compounded the error by applying an incorrect standard in the amount of fees and costs allowed under Rule 41, as well as under Rule 54(d). AWD never accepted these "terms and conditions", and seeks relief from the trial court's orders in this Court.

* * *

Objectors never address the distinctions drawn in AWD's Opening Brief regarding the unique nature of water adjudication or the bona fide reasons for AWD's dismissal of its Tributary Claim. When these factors are considered, it is the punitive condition of fees and costs which is unwarranted and unfair, and the trial court's ruling must be reversed.

* * *

SUPREME COURT, STATE OF COLORADO
Cases No. 92SA141 and 92SA263

PETITION FOR REHEARING

---

92 SA 141

AMERICAN WATER DEVELOPMENT, INC., a Colorado corporation,

Applicant-Appellant,

v.

CITY OF ALAMOSA, et al.,

Objectors-Appellees;

---

92 SA 263

AMERICAN WATER DEVELOPMENT, INC.,

Applicant-Petitioner,

v.

RIO GRANDE WATER CONSERVATION DISTRICT, et al.,

Objectors-Respondents.

Appeal from District Court, Water Division 3, Case No. 86CW46
The Honorable Robert W. Ogburn, Judge

En Banc Opinion by Justice Lohr (Justice Scott did not participate)
Judgement Entered May 9, 1994

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* * *

AWARDING $2.7 MILLION TO VOLUNTARY LITIGANTS WHO WERE NOT REQUIRED TO SATISFY STANDING REQUIREMENTS IS UNCONSTITUTIONAL.

In *Lujan v. Defenders of Wildlife,* 112 S. Ct. 2130 (1992), the United States Supreme Court held Congress cannot constitutionally relieve voluntary litigants from having to comply with traditional standing requirements. Just as Colorado's legislature has done in water cases, *see* C.R.S. § 37-92-302(1)(b). Congress had attempted to allow "any person" to litigate certain environmental claims without showing "injury in fact." The Supreme Court declared that "ignoring the concrete injury requirement . . . would be discarding a principle fundamental to the separate and distinct constitutional role" of courts. 112 S. Ct. at 2144-45 (emphasis added).

The public's interest in water and environmental matters simply cannot, according to the Supreme Court, "be converted into an individual right by a statute . . . that permits all citizens (or . . . a subclass of citizens who suffer no distinctive concrete harm)" to present their claims in litigation. *Id.* at 2145. The issue is *not* merely quantitative, contrary to this Court's reasoning in rejecting AWD's standing argument. *Compare* Opinion at 72-74 (focusing on "the number of objectors who participate in an action") *with* Opening Brief at pp. 20-22. Rather, the issue is *qualitative:* whether the person who voluntarily comes before the judiciary suffers some direct, discrete injury or is merely asserting he suffers in some indefinite way in common with people generally. 112 S. Ct. 2142-2146.

Judge Ogburn's award of $2.7 million to the Objectors strays even further from these fundamental principles. Not only were the Objectors allowed to enter court voluntarily under a statute that opens the door to "any person" without regard for the dictates of standing, but they were also rewarded for their political efforts with a massive monetary award. This Court's validation of that award is inconsistent with its announced reliance upon United States Supreme Court precedent in implementing Colorado's own standing mandates. *See, e.g., Wimberly v. Ettenberg*, 570 P.2d 535 (Colo. 1977). Indeed, in *Colorado General Assembly v. Lamm*, 700 P.2d 508, 516 (Colo. 1985) (emphasis added), this Court, citing *Wimberly*, emphasized that "[t]he requirement of an injury in fact is of *constitutional dimension.*"

It is the constitutional dimension of standing that has been ignored in this case. The very essence of due process, which binds both State and Federal governments, is "fundamental fairness." *See, e.g., Watso v. Department of Social Services*, 841 P.2d 299, 307 (Colo. 1992); *Board of Nursing v. Lang*, 842 P.2d 1383, 1386 (Colo. App. 1992). It is fundamentally unfair to uphold an award for attorney fees and costs in favor of voluntary litigants who are not required to satisfy the fundamental constitutional requirements of standing. Legislative efforts to allow "any person" to avoid those requirements cannot withstand constitutional scrutiny.

Judge Ogburn's award of $2.7 million to the Objectors, who never were required to satisfy the tests of constitutional standing, accordingly violates due process. In light of the Supreme Court's decision in *Lugan* and this

Court's repeated reliance upon the constitutional principles enforced in that case, the monetary award to the Objectors must be reversed and their claims for fees and costs dismissed for lack of constitutional standing.

* * *

No. 94-390

Supreme Court, U.S.
FILED
NOV 2 1994
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1994

AMERICAN WATER DEVELOPMENT, INC.
a Colorado Corporation,

Petitioner,

v.

CITY OF ALAMOSA, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The Colorado Supreme Court

BRIEF OF THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

I. WHETHER THE COLORADO SUPREME COURT CORRECTLY DETERMINED THAT, UNDER AN ACT OF CONGRESS PASSED IN 1860, THE BACA HEIRS HAD WAIVED THEIR CLAIM TO THE VEGAS GRANDES AND IN RETURN ACCEPTED A GRANT FROM THE UNITED STATES OF PUBLIC DOMAIN LANDS WHICH DID NOT INCLUDE ANY RIGHTS UNDER SPANISH OR MEXICAN LAW.

II. WHETHER AWDI RAISED ITS DUE PROCESS ARGUMENT IN A TIMELY MANNER IN THE COLORADO COURTS; AND, IF SO, WHETHER COLORADO LAW PERMITS PERSONS TO OPPOSE WATER RIGHT APPLICATIONS WHO DO NOT SATISFY ANY STANDING REQUIREMENT; AND, IF SO, DID THE AWARD OF ATTORNEYS' FEES AND EXPENSES TO OBJECTORS IN THIS CASE AS A CONDITION TO VOLUNTARY DISMISSAL OF AWDI'S TRIBUTARY WATER RIGHT CLAIM VIOLATE DUE PROCESS.

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No. 94-390

In The

Supreme Court of the United States

October Term, 1994

AMERICAN WATER DEVELOPMENT, INC.
a Colorado Corporation,

Petitioner,

v.

CITY OF ALAMOSA, *et al.*,

Respondents.

On Petition For Writ Of Certiorari
To The Colorado Supreme Court

BRIEF OF THE RESPONDENTS IN OPPOSITION

Respondents State of Colorado, Rio Grande Water Conservation District,[1] and Rio Grande Water Users Association[2] file this brief in opposition to the Petition for Writ of Certiorari to the Colorado Supreme Court ("Petition") filed by American Water Development, Inc.

[1] On behalf of itself and the Conejos Water Conservancy District, the San Luis Valley Irrigation Well Owners, Inc., the City of Alamosa, the Town of Monte Vista, the Town of La Jara, the Town of Crestone, Saguache County, Rio Grande County, Alamosa County, Richard Blumenheim, Oliver Powell Roemer III, and Howard R. Platz.

[2] On behalf of itself and the San Luis Valley Water Conservancy District.

("AWDI"). There are numerous misstatements of fact and law in the Petition; however, Respondents will first state the two reasons the decision by the Colorado Supreme Court does not warrant review. In the remaining sections of the brief, Respondents describe the interests which could have been adversely affected by AWDI's water rights claims and perceived misstatements of fact and law in the Petition which could have a bearing on the issues that would properly be before the Court if certiorari were granted.

I. REASONS WHY THIS CASE SHOULD NOT BE REVIEWED BY THE COURT

The petition for a writ of certiorari filed by AWDI should be denied for two reasons.

First, AWDI greatly exaggerates the importance of the Colorado Supreme Court's decision. This case does not implicate "critical federal, state and private interests throughout the vast lands in the American Southwest that once belonged to Spain," as suggested in the Petition. Petition at 3. At most, the case affects five tracts of land selected by the heirs of Luis Maria Cabeza de Baca ("Baca heirs") pursuant to an act of Congress passed in 1860. *See AWDI v. City of Alamosa*, 874 P.2d 352, 360-62 (Colo. 1994) (describing the factual background to Baca Grant No. 4) (Petitioner's Appendix ("Pet.App.") at 14-20). In return for waiving their competing claim to a tract of land claimed by the Town of Las Vegas, New Mexico (known as the "Vegas Grandes"), Congress granted the Baca heirs the right to select up to five tracts of land from the public domain in the Territory of New Mexico. Pet.App. at 20-25.

Thus, this case does not implicate "the status of water under thirty-plus million acres of the Southwest, . . . " Petition at 14. Rather, it involves the nature of the rights which the Baca heirs and their successors obtained to the tracts of land selected pursuant to the 1860 Act.

The Colorado Supreme Court, after carefully examining the 1860 Act, the historical background leading to the adoption of the 1860 Act, and prior cases relating to the tracts of land selected by the Baca heirs, concluded that the Baca heirs had waived their competing claim to the Vegas Grandes and in return accepted a grant from the United States of public domain lands which did not include any rights under Spanish or Mexican law. Pet.App. at 20-29. AWDI contends that the Colorado Supreme Court's decision is contrary to this Court's decisions in *Shaw v. Kellogg*, 170 U.S. 312, 341 (1898), and *Central Colo. Imp. Co. v. Board of Cty. Comm'rs*, 95 U.S. 259 (1877), which, according to AWDI, held that Baca Grant No. 4 is "a confirmed Hispanic land grant." Petition at 13, 19. Those cases did not speak to that issue, and AWDI misreads these cases for reasons stated by the Colorado Supreme Court in its opinion. Pet.App. at 24-25.[3]

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[3] *Shaw v. Kellogg* merely held that the grant to the Baca heirs could not be challenged on the grounds that the lands selected were mineral in character, contrary to the terms of the 1860 Act. This Court held that the Surveyor General had approved the selection of Baca Grant No. 4 and that it could not be challenged long after the three year period for making such selections had expired. *Central Colo. Imp. Co. v. Board of Cty. Comm'rs*, 95 U.S. 259 (1877), involved a Mexican grant which had been confirmed by Congress under the Treaty of Guadalupe Hidalgo, not lands selected by the Baca heirs under the 1860 Act. AWDI's reliance on *Beard v. Federy*, 70 U.S. 478 (1866), is also misplaced. That case

There are no cases cited in the Petition, and Respondents are not aware of any cases, holding that the Baca heirs or their successors obtained rights to water underlying any of the Baca grants under Spanish or Mexican law. This novel theory was advanced for the first time in 1986 by AWDI when it filed its application with the Colorado District Court in an attempt to establish a right to withdraw ground water underlying Baca Grant No. 4 superior to all other water users, federal and state, in Colorado.

The inconsistent state court decisions cited by AWDI, Petition at 14-16, involve decisions relating to Spanish or Mexican land grants which *were* recognized and confirmed pursuant to the procedures established to implement the 1848 Treaty of Guadalupe Hidalgo. As AWDI concedes, the Colorado Supreme Court held that the Baca heirs obtained substitute lands from the public domain and did not receive grants under Spanish or Mexican law. Petition at 15, 17-18, 21. Thus, this case does not present whatever conflicts may exist in the cases cited in the Petition involving water rights incident to valid Spanish or Mexican land grants. Pet.App. at 25 n. 20.

Second, AWDI's due process argument was not raised until a petition for rehearing filed with the Colorado Supreme Court, which denied AWDI's petition for rehearing without opinion. Pet.App. at 131-32. Thus, the due process argument raised in AWDI's Petition is presented in the worst possible manner for the exercise of

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involved a confirmed grant under the laws of Spain or Mexico in the State of California.

the Court's discretionary jurisdiction due to AWDI's failure to raise the argument in a timely manner in the Colorado courts. Further, AWDI misstates the facts relating to the award of fees and costs as a condition to its motion to dismiss its tributary water right claim and misstates the law relating to standing in water right proceedings in Colorado.

The relevant facts are as follows. On September 26, 1991, less than one month before trial, and almost five years after AWDI had filed its application for underground water rights in the Colorado District Court and following extensive discovery conducted by both AWDI and the objectors, AWDI moved to dismiss, without prejudice, its tributary water right claim. Pet.App. at 57-58, 111. The objectors to AWDI's application argued that if the claim was to be dismissed without prejudice, the court should condition the dismissal on the payment of objectors' reasonable attorneys' fees, expenses, and costs in opposing the claim. Pet.App. at 57.

At the hearing on the motion to dismiss, counsel for AWDI objected to the payment of any fees and costs as a term and condition of dismissal but conceded that the trial court could impose terms and conditions to prevent prejudice to the objectors from a dismissal of the claim without prejudice. Respondents' Appendix ("R.App.") at 20a and 104a. Pursuant to Rule 41(a)(2) of the Colorado Rules of Civil Procedure, which is analogous to Federal Rule of Civil Procedure 41(a)(2), the Colorado Water Judge dismissed the claim without prejudice, but with terms and conditions which he deemed proper, including payment of the objectors' reasonable attorneys' fees, costs, and expenses related to opposing that claim.

Pet.App. at 57-58, 112-14. When advised of the Court's ruling, AWDI did not seek to withdraw its motion or request that it be allowed to proceed to trial on the tributary claim. R.App. at 21a. AWDI received a full and fair hearing on the reasonableness and the necessity for the amounts to be awarded. Pet.App. at 58. AWDI then appealed the award of attorneys' fees and costs as a term and condition to the dismissal. Pet.App. at 58-59.

On appeal, AWDI argued, based on Colorado law, that the trial court could not condition voluntary dismissal of its claim on payment of attorneys' fees, expenses, and costs under Colo.R.Civ.P. 41(a)(2). Pet.App. at 58-59. The Colorado Supreme Court rejected these arguments for reasons stated in its opinion. Pet.App. at 64-69.

In a petition for rehearing, AWDI for the first time raised the argument that the award of fees and expenses to objectors in water adjudication proceedings who did not meet traditional standing requirements was a violation of due process. This issue was not briefed, and the Colorado Supreme Court denied AWDI's petition without opinion. Pet.App. at 131-32.[4]

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[4] AWDI states that "[o]n appeal AWDI raised its cluster of standing, due process and related concerns in its opening brief, . . . ; in its reply brief, . . . ; in its petition for rehearing, . . . ; and during oral argument." Petition at 10. This statement is misleading. AWDI did not raise the due process argument until its petition for rehearing, and the Colorado Supreme Court denied the petition for rehearing without opinion. In deciding whether the federal issue was properly raised at the proper time it is assumed that "when the highest state court has failed to pass upon a federal question, . . . the omission was due to want

AWDI now claims that it is "fundamentally unfair" to award attorneys' fees and costs to "voluntary litigants who are not required to satisfy the most basic, fundamental requirements of standing." Petition at 26. AWDI contends that the Colorado legislature has allowed "any person" to intervene in water right cases in Colorado and that AWDI had "no control over who chose to be Objectors or the size of the money award granted to them." Petition at 26-29. This argument mischaracterizes objectors in water right proceedings as "voluntary litigants" and misstates the standing requirements in such proceedings.

The objectors were "voluntary litigants" only in the sense that they filed statements of opposition to AWDI's application. As a matter of due process, all interested persons are entitled to notice of the pendency of an action and an opportunity to be heard. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); *Closed Basin Landowners Ass'n v. Rio Grande Water Conservation Dist.*, 734 P.2d 627, 633 (Colo. 1987). Because of the interrelated nature of appropriative water rights, *Nevada v. United States*, 463 U.S. 110, 140 (1983), all owners of water rights on a stream system whose rights could be adversely affected by an application for water rights are entitled to notice and an opportunity to be heard. *Closed Basin Landowners*, 734 P.2d at 632-35; *Stonewall Estates v. CF&I Steel Corp.*, 197 Colo. 255, 592 P.2d 1318, 1320 (1979).

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of proper presentation in the state courts. . . ." *Street v. New York*, 394 U.S. 576, 582 (1969).

Colorado has developed comprehensive statutory procedures to give notice to persons whose interests may be adversely affected by an application for water rights. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 804 (1976); *Pueblo West Metro. Dist. v. Southeastern Colo. Water Cons. Dist.*, 689 P.2d 594, 601 (Colo. 1984) (describing notice procedure for water right applications). Standing to oppose applications to determine water rights is not limited to the owners of water rights because other persons also have interests which could be adversely affected by granting an application. *Bunger v. Uncompahgre Valley Water Users Ass'n*, 192 Colo. 159, 557 P.2d 389, 392 (1976). The class of persons who may oppose a water rights application is not unlimited, but is defined by other sections of the Water Right Determination and Administration Act. *Id.*

Thus, objectors who appear in water adjudications are not "voluntary litigants" who are not required to satisfy basic standing requirements. The objectors who filed statements of opposition to AWDI's application were owners of water rights or had other interests which could have been adversely affected by granting of the application. *See* Section II *infra*. Had AWDI raised its due process argument in a timely fashion in the courts below, the Respondents would have demonstrated that they had standing to oppose AWDI's application. Likewise, the Colorado courts could have addressed AWDI's argument that the class of persons who are entitled to oppose its application included "voluntary litigants" who "were not truly litigants." Petition at 28. Because AWDI did not raise this argument in a timely manner and did not challenge the standing of any of the objectors below, the

record is not adequate to review this issue and the Colorado courts were not given an opportunity to address the standing issue in light of the federal due process challenge now raised by AWDI. Thus, this is not an appropriate case for the exercise of the Court's discretionary jurisdiction.

II. INTERESTS OF THE OBJECTORS WHICH COULD HAVE BEEN ADVERSELY AFFECTED BY AWDI'S CLAIMS

The Statement of the Case presented by AWDI is incomplete and misleading.[5] The following facts will explain the nature of the claims made by AWDI and the interests of objectors which could have been adversely affected by those claims.

In 1986 AWDI filed an application for underground water rights in the Colorado District Court for Water Division No. 3 seeking to establish the right to withdraw 200,000 acre-feet of ground water per year from proposed wells to be located on lands owned or claimed by AWDI in the San Luis Valley ("the Valley") in south-central Colorado. Pet.App. at 7-9. Part of these lands included a tract of land known as Baca Grant No. 4. *Id.* at 8-9. In its application, AWDI asserted four alternate claims, including a claim to the water underlying Baca Grant No. 4 based on Spanish or Mexican law. *Id.* AWDI also claimed

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[5] Moreover, in its Petition, AWDI includes an affidavit of a former attorney for the State of Colorado, Pet.App. at 367-69, and refers to the affidavit in its Petition, Petition at 8, without advising the Court that the affidavit was not admitted into evidence. R.App. at 108a.

that the ground water was "nontributary" under Colorado law. *Id.*[6]

An understanding of the geography and history of the Valley is helpful to understand the significance of the claims made by AWDI and why there were many objectors who opposed the application. The Valley is approximately 100 miles long and 50 miles wide and averages only seven to eight inches of precipitation annually on the Valley floor. R.App. at 26a; *Alamosa-La Jara Water Users Protection Ass'n v. Gould*, 674 P.2d 914, 917 (Colo. 1983). There are two principal rivers that arise in and flow out of the Valley, the Rio Grande and the Conejos River. R.App. at 38a-39a. The normal surface flows of these two rivers and their tributaries have been fully appropriated since the turn of the century. *Alamosa-La Jara*, 674 P.2d at 918.

North of the Rio Grande is an area known as the Closed Basin, so named because the streams that flow from the surrounding mountains onto the Valley floor have no natural outlet. R.App. at 39a-40a. The Closed Basin includes several hundred thousand acres of highly productive irrigated farmland, the Great Sand Dunes National Monument, 16 U.S.C.S. 431, Proc. No. 1994, 47 Stat. 2506, the Closed Basin Project, a federal reclamation

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[6] "Nontributary" ground water is ground water which only has a remote connection to the flow of a natural stream. Colo.Rev.Stat. § 37-90-103(10.5), Repl. Vol. 15 (1990). The Colorado Supreme Court has said that an erroneous determination that water is nontributary can have a marked, if not devastating, effect on earlier decreed priorities. *Stonewall Estates v. CF&I Steel Corp.*, 592 P.2d at 1320.

project, P.L. 92-514, 86 Stat. 964, as amended, and several state and federal wildlife areas. On the east side of the Closed Basin, bordering the Great Sand Dunes National Monument on the north and the Closed Basin Project on the east, is Baca Grant No. 4. A map showing the location of these and other features of the Valley is found in R.App. at 118a.

The Valley is underlain by two principal aquifer systems, a shallow unconfined aquifer and a deeper confined aquifer. R.App. at 12a and 29a. AWDI states that "[r]oughly two billion acre feet of ground water exist in the San Luis Valley of southern Colorado." Petition at 3. What AWDI does not disclose is that only a small fraction of that water is of usable quality. R.App. at 37a-38a. It also fails to disclose that the Water Judge, after a trial, determined that the ground water that AWDI sought to withdraw was tributary to natural streams in the Valley. Pet.App. at 29-38; R.App. at 101a. An incorrect determination that the ground water was nontributary or was owned by AWDI under Spanish or Mexican law could adversely affect water users with water rights with earlier priorities, under either state or federal law, for reasons which are explained below. Likewise, AWDI's tributary claim, if not properly subject to terms and conditions, could adversely affect senior water rights.

The waters of the Rio Grande above Fort Quitman, Texas, are apportioned between the States of Colorado, New Mexico, and Texas pursuant to an interstate compact. The Rio Grande Compact, which was approved by Congress in 1939, 53 Stat. 785 (1939), was intended to preserve existing levels of use in Colorado, New Mexico, and Texas, while allowing the United States to fulfill its

treaty obligations to the Republic of Mexico. *Alamosa-La Jara*, 674 P.2d at 918-19 (describing circumstances leading to adoption of the compact and its provisions). In 1966, Texas and New Mexico brought an original proceeding in this Court alleging that Colorado had violated the Compact. *Texas and New Mexico v. Colorado*, Original No. 29, October Term, 1966; *Alamosa-La Jara*, 674 P.2d at 919.

Colorado settled the dispute with Texas and New Mexico by a stipulation, which required Colorado to meet its state line delivery obligation on an annual basis without allowance for any debits or credits and to use all available administrative and legal powers, including curtailment of diversions, to assure annual compliance. *Texas v. Colorado*, 391 U.S. 901 (1968); *Alamosa-La Jara*, 674 P.2d at 919. The result of that stipulation was a substantial curtailment of diversions by senior surface water rights in existence well before the signing of the Compact. *Alamosa-La Jara*, 674 P.2d at 919. To assist in complying with that stipulation, the Colorado State Engineer ceased issuing well permits for new appropriations of ground water from both the confined aquifer and unconfined aquifer outside of the Closed Basin. *Id.*; R.App. at 61a. In 1981, the Colorado State Engineer determined that there was no remaining unappropriated ground water in the unconfined aquifer of the Closed Basin and ceased issuing well permits for new appropriations. R.App. at 61a.

Located in the Closed Basin in the vicinity of the Baca Grant No. 4 is the Closed Basin Project (the "Project"), a federal reclamation project. The Project salvages ground water from the sump area of the Closed Basin and delivers that water to the Rio Grande. R.App. at 48a-51a; *Closed Basin Landowners*, 734 P.2d at 629. A portion of the

project's water is used to assist the State of Colorado in meeting its obligation under the Rio Grande Compact and thereby makes more water available for use by existing water rights on the Rio Grande and the Conejos River in the Valley. R.App. at 70a-71a; *Closed Basin Landowners*, 734 P.2d at 629. Project water is also delivered to the Alamosa National Wildlife Area, the Blanca Wildlife Habitat Area, and Head and San Luis Lakes, the latter being natural lakes controlled by the Colorado Division of Wildlife. P.L. 92-514, 86 Stat. 964 as amended by P.L. 98-570, 98 Stat. 1941.

Thus, AWDI's application to establish the right to withdraw 200,000 acre-feet of ground water per year by proposed wells in the Valley could adversely affect the water rights of many water users in the Valley. For example, AWDI's own evidence showed, and the trial court found, that the water rights for the Closed Basin Project and the federal reserved water rights for the Great Sand Dunes National Monument would be significantly injured by AWDI's claims. R.App. at 51a-55a.

The Rio Grande Water Conservation District is the local sponsor of the Closed Basin Project, obtained the water right for the Project, and participates in the operation and maintenance of the Project. *Closed Basin Landowners*, 734 P.2d at 629-630; Colo.Rev. Stat. § 37-48-105, Repl. Vol. 15 (1990). The Rio Grande Water Users Association is an organization representing nearly all of the senior pre-compact water rights on the Rio Grande and whose members irrigate many thousands of acres of land with water from the Rio Grande and from wells. R.App. at 56a-57a. Its members have suffered large curtailment to comply with the Rio Grande Compact and that burden is

reduced by the Closed Basin Project. R.App. at 69a-70a. The trial court found that AWDI's claim would have significantly reduced their existing water supply and would have reduced the amount of water available from the Closed Basin Project to meet the State of Colorado's obligations under the Rio Grande Compact. R.App. at 90a.

The Colorado Division of Wildlife owns water rights and wildlife facilities within the Valley. The trial court found that its water rights for Head and San Luis Lakes would be injured by AWDI's claims. R.App. at 51a. The Colorado State Engineer is the Rio Grande Compact Commissioner for Colorado and the State official charged with the administration of water rights in Colorado and participates in water rights litigation to prevent injury to vested water rights. *Wadsworth v. Kuiper*, 193 Colo. 95, 562 P.2d 1114 (1977); Colo.Rev.Stat. §§ 37-80-102 and 37-92-501, Repl. Vol. 15 (1990).

Clearly, these objectors had standing to oppose AWDI's application. Except for the unsubstantiated allegation that "any person" was allowed to participate in the case, AWDI has not identified any objectors who lacked standing to oppose its application.

III. AWDI DOES NOT ACCURATELY DESCRIBE THE STATUS OF THE BACA GRANT NO. 4

AWDI's Petition is predicated upon a fundamental misstatement or misunderstanding of an act of Congress passed in 1854. AWDI's misunderstanding appears first at page 5 of the Petition, where it states:

> The 1854 Act also reserved all of the ceded Territory of New Mexico (which included the San Luis Valley of southern Colorado) from the public domain pending settlement of the land claims.

Even a cursory review of the 1854 Act (Pet.App. at 220-226) makes it clear that the Act did not withdraw all of the ceded territory of New Mexico. The last phrase of Section 8 of the 1854 Act reads as follows:

> . . . and, until the final action of Congress on such claims, all lands covered thereby shall be reserved from sale or other disposal by the government, and shall not be subject to the donations granted by the previous provisions of this Act.

Pet.App. at 224. The only lands reserved from sale or other disposal by the 1854 Act were those lands then subject to pending land claims. The land which is now included in Baca Grant No. 4 was not subject to such a claim in 1854. *Id.* at 22. From the time the Treaty of Guadalupe Hidalgo was ratified by Congress in 1848 until 1862, when it was selected by the Baca heirs, Baca Grant No. 4 was part of the vacant public domain subject to entry or donation pursuant to the laws of the United States. *Id.* at 19.

AWDI's fundamental misunderstanding of the 1854 Act is again apparent at page 22 of its brief, where it states:

> As explained above, even if the Baca grant is not recognized as a cession directly from Spain and Mexico, it was created out of lands *reserved* by

> Congress in § 8 of the 1860 Act in discharge of its Treaty obligations. [Emphasis in original.]

There is no Section 8 in the 1860 Act. Pet.App. at 234-37. Presumably, AWDI intended to refer to Section 8 of the 1854 Act; however, the statement is based upon the assumption that all of the ceded territory of New Mexico was reserved from sale or other disposal by Congress in 1854, which is simply not correct. Only those lands that were covered by pending claims were reserved from sale or other disposal until Congress had an opportunity to review such claims. Act of July 22, 1854, § 8; Pet.App. at 223-24.

In accordance with Section 8 of 1854 Act, the Surveyor General prepared a report on claims to lands under the laws of Spain and Mexico, dated December 18, 1858, which was transmitted to Congress. H.R. Exec. Doc. No. 14, 36th Cong., 1st Sess. (1860). Pet.App. at 156-94. The report covered Spanish and Mexican claims numbered 20 through 38. *Id.* at 157. Claim No. 20 constituted the claim to the Vegas Grandes. *Id.* at 158. The Surveyor General determined that there were two conflicting grants to the Vegas Grandes. The purpose and effect of the Surveyor General's investigation is made clear in the last paragraph of his report:

> It is firmly believed that the land embraced in either of the two grants is lawfully separated from the public domain and entirely beyond the disposal of the general government, and that in the absence of the one the other would be a good and valid grant; but as this office has no power to decide between conflicting parties, they are referred to the proper tribunals of the country for the adjudication of their respective

> claims, and the case is hereby respectfully referred to Congress through the proper channel for its action in the premises.

Pet.App. at 193-94. Thus, in the Surveyor General's opinion, the Vegas Grandes, which was subject to two competing claims, was separated from the public domain and could not be disposed of by the federal government; that is all that occurred under the 1854 Act.

All lands acquired by the United States under the Treaty of Guadalupe Hidalgo that were not subject to valid Spanish or Mexican grants at the date of the Treaty became part of the public domain with the United States as proprietor. *United States v. Sandoval*, 167 U.S. 278, 296-97 (1897). AWDI has no basis, other than a bald-faced misreading of the 1854 Act, to support its statement that the land included in Baca Grant No. 4 was not a part of the public domain in 1862 when it was selected by the Baca heirs under the 1860 Act.

On February 28, 1861, the Territory of Colorado was organized, Ch. 59, 12 Stat. 172 (1861), which included the land now included in Baca Grant No. 4. Pet.App. at 19. The first legislative assembly of the Territory of Colorado was held on September 9, 1861, and the first laws of the territory were passed at that time. *See* General Laws of Colorado, 1st Sess., Legislative Assembly, Territory of Colorado, 1861. These laws preserved the custom of the appropriation doctrine which previously existed in lands that became the Territory of Colorado. Pet.App. at 28 n. 21; *Coffin v. Left-Hand Ditch Company*, 6 Colo. 443, 448 (1882). Those lands included the property that was selected as Baca Grant No. 4. Over a year later, on December 12, 1862, John S. Watts, attorney for the Baca heirs,

selected the Baca Grant No. 4 as one of the five tracts of land which Congress had permitted in the 1860 Act. *Shaw v. Kellogg*, 170 U.S. at 315-16. The land was surveyed in 1863 and in 1864 the title passed pursuant to the 1860 Act. Pet.App. at 19.

AWDI goes to great lengths to discuss the manner in which water is allocated in Colorado. At no point in its discussion does AWDI cite *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 163-64 (1935), in which the Court held that federal land conveyances do not inherently carry water rights. The nature and extent of water rights, if any, accompanying such conveyances are, unless the federal government otherwise provides, determined by the law of the locality in which the tract is situated. *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. at 162.

AWDI predicates its argument on the theory that the grant to the Vegas Grandes made under Spanish or Mexican law was transferred to the lands selected by the Baca heirs. Petition at 17. This Court has described the resolution of the competing claims to the Vegas Grandes as follows:

> Congress accommodated the dispute by a magnificent donation of lands to the heirs of Baca, and confirmed the original land to the Town; . . .

Maese v. Herman, 183 U.S. 572, 581 (1902). Every other court that has examined the issue has held that by accepting Congress' grant, the Baca heirs waived their claim to the Vegas Grandes. In *Lane v. Watts*, 234 U.S. 525, 541-42

(1914), the Court observed that "to accommodate conflicting claims, and at the instance of the government, the Baca claimants gave up their rights to a definite tract of land. . . . " The Ninth Circuit Court of Appeals, in examining and rejecting a claim presented by certain Baca heirs who did not participate in the Congressional compromise, described the circumstance as follows:

> Those who claimed under that prior grant waived their priority in favor of the Town of Las Vegas, in consideration of which waiver, Congress made to them a grant of other lands not covered by any Mexican grant, one of which tracts is that here in controversy.

Wise v. Watts, 239 F. 207, 226-27 (9th Cir.), *cert. denied*, 244 U.S. 661 (1917) (concerning Baca Grant No. 3 in the State of Arizona).

There is no conflict between the Colorado Supreme Court decision and the decision of any other court concerning the Baca grants. Nor are there any special and important reasons which would warrant review of the decision of the Colorado Supreme Court.

IV. AWDI DOES NOT ACCURATELY DESCRIBE THE WATER COURTS OR THE PROCEDURES FOR ADJUDICATING WATER RIGHTS IN COLORADO

AWDI does not accurately describe the water courts in Colorado. The State of Colorado, like most western states, relies upon the doctrine of prior appropriation in establishing rights to use water. *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 805 (1976).

The prior appropriation system requires the permanent fixing of the right to use water at the time of the adjudication. *United States v. District Court*, 401 U.S. 520 (1971). The Water Right Determination and Administration Act of 1969, Colo.Rev.Stat. §§ 37-92-101 through 602, Repl. Vol. 15 (1990) and Cum. Supp. (1994) ("1969 Act"), provides the current statutory framework for adjudication of rights under a system of priorities. The 1969 Act established the position of water judge within each of seven water districts in Colorado. *State v. Southwestern Colo. Water Cons. Dist.*, 671 P.2d 1294, 1308 (Colo. 1984). In Colorado, the trial court of general jurisdiction is the district court. Colo. Const., Art. VI, Sec. 9. Water judges are district court judges who are designated by the Colorado Supreme Court to hear water matters in addition to their regular duties of a district judge. Colo.Rev.Stat. § 37-92-203(2), Repl. Vol. 15 (1990). Water judges have exclusive jurisdiction over "water matters" within their water division. *Id.*, § 37-92-203(1).

AWDI suggests that the Colorado water courts are specialized tribunals that may not constitutionally make binding and enforceable awards of money between private parties. Petition at 28. This is not correct. As discussed above, district courts are the constitutionally established trial courts of general jurisdiction in Colorado. The water judges are simply district court judges who have exclusive jurisdiction over water matters. Thus, these courts do not raise the problems created by the specialized tribunals disapproved of in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 87 (1982).

AWDI also has not properly described the statutory procedures used to determine water rights in Colorado. Because common law forms of action and bills in equity were inadequate to determine appropriative water rights, Colorado at an early date established statutory procedures for determination of water rights, which include notice by publication. *The Union Colony of Colorado v. Elliott*, 5 Colo. 371, 378-80 (1880). Instead of requiring a party seeking a water right to personally serve all necessary parties, the statutory provisions require the clerk of the water court to publish notice of all applications received by the court in the preceding month (called the "resume") in local newspapers and by mailing the resume to individuals who have requested a copy of the resume. Colo.Rev.Stat. § 37-92-302(3), Repl. Vol. 15 (1990). Any person whose interests may be adversely affected may file a statement of opposition to the water right applications published in the resume. Colo.Rev.Stat. § 37-92-302(1)(b), Repl. Vol. 15 (1990).

AWDI bases much of its due process argument on its contention that the 1969 Act does not impose a standing requirement on persons who may file statements of opposition. Petition at 26-29. AWDI's contention appears to be based on a misreading of *Bunger v. Uncompahgre Valley Water Users Association*, 192 Colo. 159, 557 P.2d 389 (1976).

In *Bunger* an applicant asserted that an objector to his water right application did not have standing to challenge his application in the water courts. 557 P.2d at 392. The applicant relied on cases decided under the Adjudication Act of 1943, which had limited objectors to owners or claimants of water rights. *Id.* The Colorado Supreme Court in *Bunger* held that the 1969 Act is not as limiting

as the 1943 Act. *Id.* The Court further held that the 1969 Act allowed those persons whose capacity to protest or object is generally described in the 1969 Act to participate in water court proceedings. *Id.* The *Bunger* court did not eliminate standing requirements altogether, nor did the 1969 Act.[7]

Water rights are considered property interests in Colorado. *Gardner v. State*, 200 Colo. 221, 614 P.2d 357 (1980). There is certainly evidence in the record to demonstrate that objectors could have established standing if the issue had been raised by AWDI in the trial court. *See supra* pp. 10-14. Each one of the Objectors that were awarded costs and attorney fees following AWDI's dismissal of the tributary claims owned or otherwise had an interest in water rights that would have been injured by granting AWDI's water right application.

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[7] For example, the Colorado Supreme Court in *Bijou Irrigation Dist. v. Empire Club*, 804 P.2d 175, 187 n. 20 (1991), raised standing *sua sponte* and stated that while the objectors did not allege injury to a water right of their own, their allegation of injury to other legal rights would have been sufficient to satisfy general principles of standing.

V. CONCLUSION

For the reasons stated, the Petition for Writ of Certiorari in this matter should be denied.

Respectfully submitted,

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No. 94-390

In The

Supreme Court of the United States

October Term, 1994

AMERICAN WATER DEVELOPMENT, INC.,
a Colorado Corporation,

Petitioner,

v.

CITY OF ALAMOSA, *et al.*,

Respondents.

On Petition For Writ Of Certiorari
To The Colorado Supreme Court

APPENDIX TO BRIEF IN OPPOSITION OF STATE OF COLORADO, RIO GRANDE WATER CONSERVATION DISTRICT, AND RIO GRANDE WATER USERS ASSOCIATION

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DISTRICT COURT, WATER DIVISION 3, COLORADO

CASE NO. 86-CW-46

FINDINGS OF FACT, CONCLUSIONS OF LAW, JUDGMENT AND DECREE

CONCERNING THE APPLICATION FOR WATER RIGHTS OF:

AMERICAN WATER DEVELOPMENT, INC.,

IN ALAMOSA, CONEJOS, COSTILLA, HINSDALE, MINERAL, RIO GRANDE AND SAGUACHE COUNTIES.

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THIS MATTER came before the Court on the Application for Underground Water Rights or, in the Alternative, for the Determination of Rights to Nontributary Groundwater Outside of Designated Groundwater Basins. The trial began October 15, 1991 and continued until completion on November 22, 1991. The Applicant was represented by Mr. David C. Hallford and Mr. Thomas S. Crabb of Saunders, Snyder, Ross and Dickson, P.C. There were five principal objectors that appeared and presented evidence at trial. The Objector Rio Grande Water Conservation District, appearing on behalf of itself and the Joint Objectors[1] (collectively "Joint Objectors"), was represented by Mr. David W. Robbins of the firm of Hill & Robbins, P.C. The Rio Grande Water Users Association ("Water Users") was represented by Mr. William A. Paddock of Carlson, Hammond & Paddock. The United States of America was represented by Mr. John R. Hill, Jr. and Mr. James J. DuBois of the Department of Justice. The State Engineer and the Division Engineer, the Colorado

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[1] The following Objectors appeared with the District jointly for purposes of this case: Conejos Water Conservancy District, San Luis Valley Water Conservancy District, San Luis Valley Irrigation Well Owners, Inc., the City of Alamosa, the Town of Monte Vista, the Town of La Jara, the Town of Crestone, Alamosa County, Saguache County, and Rio Grande County.

Division of Wildlife and the Colorado Water Conservation Board (collectively "State") were represented by Mr. Bradley W. Cameron and Ms. Christine A. Klein, Assistant Attorneys General for the State of Colorado. Mr. Fred Bauder appeared pro se. The Court, having considered the files herein, the pleadings, the evidence presented at trial, and the arguments of the parties, finds as follows:

I. PROCEDURAL BACKGROUND

> "Next to blood relationships, which rule the valley, come water relationships. The arteries of ditches and bloodlines cut across each other in patterns of astounding complexity. . . . As mayordomo you become the pump, the heart that moves the vital fluid down the artery to the little plots of land on each of the cells, the parciantes."
>
> – Stanley Crawford

1. The original application was filed on December 31, 1986 by American Water Development, Inc., the Baca Ranch Company, and the Baca Ranch Corporation (collectively "Applicant").[2] An amendment to legal descriptions in the original application was filed on February 23, 1987. The original application as amended was published in the manner required by law. Due to errors in the newspapers publications of the original application, on March 26, 1987, the Court ordered republication of the application

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[2] Upon granting of the motion for leave to file the Amended Application, American Water Development was the sole Applicant. For ease of reference the term Applicant is used throughout.

and extended the period for filing of statements of opposition until the last day of May, 1987.

2. Statements of opposition to the original application were timely filed by City of Alamosa; County of Alamosa; Richard Angel; Baca Grande Water and Sanitation District; Fred Bauder; Cyril Clayton; David P. and Barbara J. Collins; Colorado Division of Wildlife; Colorado Water Conservation Board; Conejos Water Conservancy District; Concerned Citizens of Crestone (Bill Hutchinson, James Kent Murray, Robert W. King); Town of Crestone; Tom Enos; First Interstate Bank of Denver; First Pegasus Corporation; Harold L. and Terry Lee Freel; Fullenwider Ranch, Inc.; Ernest T. and Grace Harer; Town of Hooper; Town of La Jara; John M. Lawrence; Town of Monte Vista; Jimmy R. and Mary Moore; Darrel and Harold Neese; Edward R. Oliver; Howard Platz; Rio Grande County Commissioners; Rio Grande County Farm Bureau; Rio Grande Water Conservation District; Rio Grande Water Users Association; Rito Alto Ranches; Arthur L. and Ileen J. Rivale; County of Saguache; Town of Saguache; San Luis Valley Irrigation Well Owners, Inc.; San Luis Valley Water Conservancy District; Thomas C. Sanderson; Loren R. and Julie A. Santisteven; Neil F. Seitz d/b/a Valley View Hot Springs; David G. Stagner; the State Engineer and the Division Engineer for Water Division 3; The Travelers Insurance Company; the United States of America; Weiss Ranches, Inc.; A. L. Wood; and Erwin and Lynn Young. By Order dated January 10, 1989, Otaka International was permitted to intervene in these proceedings. By Order dated May 7, 1990, Rocky Mountain Bison, Inc. was substituted for Otaka International.

Neil F. Seitz withdrew his statement of opposition pursuant to a stipulation and agreement dated June 10, 1988.

3. By Order dated October 7, 1990, *nunc pro tunc*, August 31, 1990, the Court granted the Applicant leave to file an amended application. Each statement of opposition filed to the original application was deemed to apply to the amended application. New statements of opposition to the amended application were filed by Wagner Ranch; J. Richard and Mary A. Johnson; D. Robin Hood; John M. Woodard; Thomas F. and Annabelle R. Trim; Eugene W. Freel and Beverly Freel; Rito Alto Ranch, Inc. (M. Shellabarger, President); Rito Alto and San Luis Ranches, Inc. (M. Shellabarger, Vice President); Eugene W. and Beverly Freel with Martin T. Shellabarger and Patricia Shellabarger; Cotton Creek Ranch by John C. Mattingly, General Manager; Lena C. Chiles, Floyd D. Chiles and Terry R. Chiles; Robert A. Owens; Edwin Pace; Fred J. Davie and Douglas M. Davie; Ernest Lamar Goodwin; Dave Collins; Villa Grove Area Water Users (c/o Amber Shook); Bonanza Road Water Users, an association (c/o Eugene Augusto); Richard Blumenhein; Gayle A. Nichols; Kenneth L. and Mary F. Skoglund; LD Ranch; Henry R. and Mable A. Lamm; 44 individuals later identified as Concerned Citizens of the San Luis Valley Water (c/o Barbara Mertian); Haidakhandi Universal Ashram; Columbine Telephone Company; Spiritual Life Institute of America, Inc.; Timothy N. and Lori S. Lovato; Darell Keith Alexander-Alexander Ranch; Dennis L. Felmlee; Morfitt Bros. Farm, Inc.; Richard W. Hanby; Harold L. Bennett; Marold Ranches; Town of Moffat; Pamyla Hill; Michael R. Dennett; and Lazy KV Estates.

4. Tom Enos was removed from the mailing list by Order dated February 26, 1990, because the Court no longer had a current address for him on file. First Pegasus Corporation, A. L. Wood and Richard Angel were removed from the mailing list for the same reason by Orders dated November 8, 1990.

5. Timely and adequate notice of the original application and the amended application have been given in the manner required by law and the time for filing statements of opposition and for seeking leave to intervene has expired. None of the land or ground water involved herein is located within the boundaries of a designated ground water basin. The Court has jurisdiction over all of the subject matter, over the claims made by the Applicant and over all persons who have standing to appear as parties, whether they have appeared or not.

6. In accordance with §37-92-302(2), C.R.S., the office of the State Engineer issued its determination of facts on April 29, 1987, and the Court has given it due consideration.

7. From its inception this case has been fraught with procedural, discovery and other disputes. The first such dispute involved who would serve as counsel for the Applicant. That dispute was resolved when on October 15, 1987, the law firm of Saunders, Snyder, Ross and Dickson, P.C., entered its appearance as co-counsel on behalf of the Applicant. At all times subsequent to October 15, 1987, the Applicant has been represented in this matter by the law firm of Saunders, Snyder, Ross and Dickson, P.C.

8. Thereafter, the parties pursued discovery and a substantial number of motions to compel, motions for protective orders and motions to strike were heard and resolved by the Court.[3]

9. In May of 1990, after three and one-half years of discovery and extensive motions practice, the Joint Objectors, the Water Users, and the United States of America filed a Motion to Enter Case Management Order. The State of Colorado joined in the motion but requested modification of certain of the proposed deadlines. The stated purpose of the motion was to establish both the steps remaining to be completed prior to trial and the schedule for doing so. The Applicant responded that a time table to complete discovery and to prepare for trial would be desirable but raised numerous procedural and other objections to the Order proposed by the Objectors.

10. A hearing on the Motion to Enter Case Management Order was held on July 5, 1990. The Applicant initially resisted any scheduling or trial settings. Eventually, the Applicant agreed to a tentative trial setting in October, 1991. The parties were then able to agree on deadlines for completion of expert and non-expert discovery, and a deadline for dispositive motions. The Court ordered, with the Applicant's consent, that any amendment to the pleadings be filed within ninety days, with no amendments to be made thereafter.

11. During the course of the July 5, 1991 hearing on the Motion to Enter Case Management Order, the Applicant made plain to the Court that it was not willing to

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[3] For an expression of the court's frustration at times, see Order dated April 6, 1990. It represents an unconventional approach to dealing with on-going discovery problems.

affirmatively set forth the basis for its claims and the opinions of its experts until it knew the opinions of each of the Objectors' expert witnesses. The Objectors asserted that they would not be in a position to determine the identity of all of their experts, their opinions or the full extent of injury claimed until they knew the substance of and the basis for the opinions of the Applicant's experts. After hearing the arguments of counsel, the Court took the matter under advisement. Thereafter, the Applicant submitted to the Court a proposed Case Management Order substantially similar to that proposed by the Objectors, except for the provisions on expert discovery.

12. During the course of the trial, the Court came to appreciate the reason for the Applicant's opposition to the Case Management Order. It is apparent that although the Applicant brought the case and bore the burden of proof, in 1986, and perhaps even today, it had no clear plan how to successfully prove its nontributary claim. It therefore wanted to require the Objectors to first engineer their defense to the claim so that the Applicant could then attempt to engineer its way around the Objectors.

13. On July 11, 1990, the Court entered its Case Management Order to govern the steps to be taken by the parties prior to trial and the deadlines for completing those tasks. Among the deadlines established were a general discovery cut-off and sequential disclosure of expert opinions and deposition of experts. During the remaining course of the proceedings, the Case Management Order was amended to adjust for changed circumstances and to insure full and complete discovery to all parties.

14. Pursuant to the procedures of the Case Management Order, the Applicant identified some 27 expert witness [sic] that it proposed to call at the time of trial. It withdrew six of the designated witnesses prior to the time for their depositions. After completion of discovery of the Objectors' expert witnesses, the Applicant sought and was granted leave to identify and designate rebuttal experts. On September 24, 1991, the Applicant provided the names and summaries of the opinions and testimony of its twelve rebuttal experts, four of whom had been identified as experts for the Applicant's case in chief. The Objectors were afforded an opportunity to depose the rebuttal experts prior to the time of trial.

15. The entry of the Case Management Order did not end the discovery disputes. In November of 1990, the Court held a telephonic conference regarding the deposition of Applicant's expert, Dan Ault, and the very narrow construction the Applicant placed on the permissible scope of expert discovery. At that time the Court was required to direct the Applicant that the limitations it sought to impose were too narrow and not in compliance with applicable law. Subsequently, it was learned that some of the Applicant's 27 identified experts had not completed their work or fully formed their opinions. An extension of time to depose these experts was granted until the Applicant certified the experts' work had been completed.

16. There were also a number of motions for protective orders filed by the Objectors in response to a large number of blanket-type written discovery requests filed by the Applicant on or about the last day for filing written discovery. For example, the United States sought

and was granted a protective order against the Applicant's November 30, 1990 discovery requests of 209 pages containing 3,838 interrogatories and subparts. There were likewise motions for protective orders filed by the Objectors in response to Applicant's noticing of some 21 depositions to be conducted in three cities in the remaining 14 working days of December, 1990. The Applicant filed a like motion in response to depositions noticed by the Objectors in December. These matters were handled by telephone conference and resolved by the Court's order of January 15, 1991.

II. APPLICANT'S CLAIMS FOR RELIEF

> "In my youth I took to the Law, And argued each case with my wife; And the muscular strength, Which it gave to my jaw, Has lasted the rest of my life."
>
> – Lewis Carroll

17. The original application in this case sought the right to withdraw 200,000 acre-feet of ground water per year from 112 proposed wells to be located on the lands owned or claimed by the Applicant. The Applicant claimed to be the owner of more than 100,000 acres of land in the San Luis Valley located in two distinct areas. The majority of the lands include the so-called Baca Grant No. 4 and parcels of land adjacent thereto. The balance of the lands are located some twenty miles to the north in the vicinity of the Town of Villa Grove, where the Applicant claims to own approximately 4,683 acres of land. The

relative locations of these land holdings and other important features in the Valley are shown on Objectors' Exhibit US 154.

18. The 112 wells proposed in the original application were to be 2,500 feet deep and perforated from 200 feet to 2,500 feet in depth. The claimed pumping rate was 5,000 gallons per minute or 11.14 cubic feet per second, conditional, per well. Ninety-two of the wells were to be located on the Baca Grant No. 4, nine of the wells were to be located on lands located just west of the Baca Grant No. 4 near the Town of Moffat, and the remaining eleven wells were to be located on the Applicant's property near the Town of Villa Grove.

19. The original application claimed water on four alternative bases. The first was a claim that the water was nontributary pursuant to §37-90-137(4), C.R.S., and subject to adjudication by this Court pursuant to §37-92-302, C.R.S.

20. The second claim involved Spanish and Mexican law. The Applicant's theory was essentially that the Baca Grant No. 4 was a replacement grant for one previously given to the Applicant's predecessor, Luis Maria Cabeza de Baca. The prior grant was alleged to be the Las Vegas Grandes, located in what is now the State of New Mexico near the Town of Las Vegas. The Applicant claimed that by various acts of the United States, the Treaty of Guadalupe Hidalgo, and Spanish and Mexican law, it was the owner of overlying land and had the right to absolute and undiminished use and disposition of all underground water, tributary or otherwise, that it might be able to capture through wells located on the Baca Grant No. 4.

This claim did not extend to any well not located on the Baca Grant No. 4.

21. The third claim for relief was pursuant to the Act of June 21, 1860, which the Applicant alleged was an absolute grant by the United States, authorizing the heirs of Cabeza de Baca to select up to five tracts of land in "replacement" for the land grant relinquished by them in New Mexico. The Applicant's theory was that the act of Congress divested the United States of all legal right, title and interest to the premises constituting the Baca Grant No. 4, segregated it from the public domain, and based upon its ownership, the Applicant was entitled to the absolute, undiminished disposition of all underground water, tributary or otherwise, which could be captured through wells located on the Baca Grant No. 4.

22. The final claim for relief in the application was for tributary ground water underlying all of the Applicant's lands. The original application claimed this water solely for use on the lands of the Applicant.

23. The source of water claimed in the application was the "San Luis Valley Aquifer," a term used by the Applicant throughout the course of the trial. The Court finds this term to have no descriptive value when applied to the hydrologic and geologic systems in the San Luis Valley. It is not a term in common usage by experts in the field, it is unsupported by the evidence offered at trial, and it fails to recognize the two distinct and separately managed aquifer systems which exist within the San Luis Valley.

24. The proposed use of the water under each claim for relief included the proposed irrigation of approximately 38,000 acres of land on or adjacent to the Baca Grant No. 4 in the San Luis Valley. The beneficial uses claimed included municipal, domestic, industrial, commercial, fire protection, irrigation, stock watering, recreation, fish and wildlife preservation and propagation, and all other beneficial uses. The water was claimed for use by immediate application to beneficial use, for storage and subsequent application to beneficial use, for exchange purposes, for replacement of depletions, for all other augmentation purposes, including taking credit for return flows resulting from the use of said water in plans for augmentation. The Applicant claimed these rights for itself, its successors, assigns, lessees and contractors.

25. The application also stated that it was only a claim for certain underground waters described in the application and was intended to be without prejudice to any future uses, claims or applications for surface water or underground waters which are not claimed in the application, including additional underground water from the lands subject to the application.

26. The amended application, filed in August of 1990, maintained the four alternative bases for claimed water as identified in the original application. However, the amended application changed the location of some of the wells and added additional wells. In the amended application, the Applicant sought approximately 117 wells located on the Baca Grant and adjacent properties owned by the Applicant and 15 wells to be located on the property owned near the Town of Villa Grove. The amended application continued to claim ground water

from wells perforated between 200 and 2,500 feet below ground surface and the source of water continued to be referred to as the "San Luis Valley Aquifer". The amended application also continued the Applicant's claim of right to produce 200,000 acre-feet of water annually for beneficial use from the wells described in the application but proposed to limit the initial production to 60,000 acre-feet as part of Phase I of its project. The pumping rate for each of the proposed wells was the same as in the original application, 5,000 gallons per minute.

27. The amended application claimed that approximately 30,000 acres of land on the Baca Grant No. 4 and the lands adjacent thereto and on the property near Villa Grove would be irrigated with water produced from the wells. Ten thousand acres were proposed to be irrigated through the first phase of the development. The Applicant also asserted the right to use water as a water supply for any additional properties that the Applicant may subsequently acquire within the State of Colorado and as a water supply for such other property along the Front Range within the State of Colorado as the Applicant may choose to supply. The amended application proposed to commit up to 30,000 acre-feet per year from the yield of the first phase to supply development of water along the Front Range of the State of Colorado with the remaining 30,000 acre-feet annually to be used within the San Luis Valley. The precise locus of use of the remaining 140,000 acre-feet of water claimed was not specifically stated. Presumably, a portion of this water would be required for irrigation of the remaining 20,000 acres of land described in the amended application. These claimed uses were said

to be applicable to each of the four alternative bases upon which the Applicant claimed entitlement to the water. For the tributary claim it continued to rely upon the appropriation date set forth in the original application. The Applicant continued to assert in the amended application that it sought only to adjudicate the rights claimed in the amended application without prejudice to any future claims the Applicant may choose to make for other rights from any source of supply. The amended application was the first time that the Applicant expressly pleaded that any tributary ground water would be used off its property or outside of Water Division No. 3.

28. The amended application contained a fifth claim for relief not set forth in the original application. That claim contained the Applicant's request that the Court make certain factual investigations and determinations about the presence or absence of injury from Applicant's proposed ground water pumping and what would be required to remedy that injury. The Applicant set forth alternative proposals to remedy any injury that the Court, as a result of its "factual investigations", might determine to exist. The so-called protective measures proposed by the Applicant included proposed changes of water rights, appropriative rights of exchange, and a plan for augmentation. The changes of water rights proposed by the Applicant, although not fully described in the application, apparently contemplated the change of water rights historically used for irrigation purposes to permit the historic consumptive use from those water rights to be used to offset the stream depletions resulting from the Applicant's pumping.

29. The Applicant also proposed to supply needed augmentation water by various exchanges, including various exchanges of water storage and release of water in Platoro Reservoir and other structures. Another proposed exchange contemplated use of the federal reclamation project known as the Closed Basin Project to deliver water either from Closed Basin Project wells or the Applicant's proposed wells to the Rio Grande, and thence delivery of the same by exchange to water users on the Rio Grande, La Jara Creek, the Alamosa River and the Conejos River to prevent injury. Although Claim V denominated portions of it as a plan for augmentation, Claim V in the amended application did not contain the information required for a complete statement of a plan for augmentation as contemplated by §37-92-302, C.R.S.

III. PARTIAL SUMMARY JUDGMENT RULINGS

> " . . . if it was so, it might be; and if it were so, it would be; but as it isn't, it ain't. That's Logic."
>
> – Lewis Carroll

30. Throughout the course of this case, there have been a substantial number of motions filed on questions of law, many of which sought partial summary judgment. The Court heard and granted or denied a number of such motions. Those rulings pertinent to an understanding of this case are described below.

31. Chronologically, the first such motion was the Joint Objectors' Motion for Partial Summary Judgment, seeking a ruling that the Applicant could not collaterally attack the Closed Basin Project and its decreed water right. *See Closed Basin Landowners Ass'n v. Rio Grande*

Water Conservation Dist., 734 P.2d 627 (Colo. 1987). The Court granted the motion and by Order dated September 28, 1989, barred the Applicant from challenging, in this case, the economic or physical feasibility of the Closed Basin Project; the right of the District to fully exercise its water rights consistent with the terms of the decree; and the reasonableness of the means of diversion of the Closed Basin Project wells. At the same time the Court denied as moot, and without prejudice, the United States' Motion for Partial Summary Judgment that certain State water law doctrines were inapplicable to the Closed Basin Project as a federal reclamation project. *See California v. United States*, 438 U.S. 645 (1978); *United States v. California State Water Resources Control Board*, 694 F.2d 1171 (9th Cir. 1982). Those rulings are reaffirmed and incorporated herein by this reference.

32. In response to the discovery propounded by the Objectors, the Applicant alleged that two statutes potentially applicable to its claims, §§37-82-101(2) and 37-92-102(1)(b), C.R.S., were unconstitutional, special legislation under Art. V, §25 of the Colorado Constitution. The Objectors moved for partial summary judgment seeking a determination that those statutes were not unconstitutional. By order dated May 8, 1990, the Court ruled that the statutes were constitutional and did not violate Art. V, §25 of the Colorado Constitution. That ruling is reaffirmed and incorporated herein by this reference.

33. The Objectors also moved for partial summary judgment dismissing Claims II and III of the application, the claims based upon Mexican and Spanish law, and upon an alleged grant under federal law. The Court heard argument on the motion and on July 5, 1990, entered an

Order granting partial summary judgment dismissing Claims II and III of the application. That ruling is reaffirmed and incorporated herein by this reference.

34. At the same time that the Objectors sought partial summary judgment dismissing Claims II and III of the application, the Applicant sought partial summary judgment that the Court had jurisdiction over those claims. The Applicant likewise sought a determination of certain questions of law governing its claim for nontributary ground water. By Order dated July 5, 1990, the Court granted Applicant's motion for partial summary judgment on the jurisdictional issue and made certain determinations requested by the Applicant regarding the law applicable to its claim for nontributary ground water. Those rulings are reaffirmed and incorporated herein by this reference.

IV. PRE-TRIAL CONFERENCE

"Let's muddy up the water."

– Water lawyer

35. By Order dated August 22, 1991, the Court set a Pretrial Conference for September 26, 1991, to address matters specified in the Court's order. At that time there were three unresolved claims remaining before the Court, *i.e.*, the claim for nontributary ground water, the claim for tributary ground water, and the claimed plan for augmentation, change of water rights, exchange and "mitigation" plan; namely Claims I, IV and V of the amended application. All pending motions in limine and dispositive motions filed pursuant to the Case Management Order were heard at that conference. The Applicant filed

two motions in limine apparently directed at evidence it believed would be offered against its tributary ground water claim. The first motion in limine sought to exclude evidence regarding the water rights applied for by the Water Users and the Conejos Water Conservancy District in Case Nos. 90CW42, 90CW45 and 90CW48. That motion was granted. The Applicant's second motion in limine sought to exclude evidence about certain alleged historical irrigation practices. That motion was denied without prejudice to raise an appropriate objection to such evidence, if offered, during trial.

36. At the Pretrial Conference the Court heard two motions for partial summary judgment filed by the Objectors. The first sought dismissal of the Applicant's claim for nontributary ground water. That motion was denied. The second sought to dismiss that portion of the Applicant's fifth claim that sought appropriative rights of exchange requiring use of water diversion, storage and conveyance facilities in which the Applicant owned no interest or had no contractual right of use. The Applicant made strenuous argument against granting of the motion. However, since the Applicant did not show the existence of a genuine issue as to any material fact, the motion was granted. At the hearing the Court also granted the Applicant's fourth motion to amend the Case Management Order, denied the Objectors' motion in limine regarding expert testimony of James Lancaster, and granted in part and denied in part the Objectors' motion regarding testimony by previously designated and withdrawn expert witnesses. Each of the motions in limine that was denied by the Court was without prejudice to raising a proper objection to evidence presented during the course of trial.

37. Near the conclusion of the Pretrial Conference, the lead counsel for the Applicant, Mr. Jack Ross, tendered to the Court and parties a motion to dismiss without prejudice under Colo.R.Civ.P. 41(a)(2) the Applicant's tributary ground water claim. This typewritten motion with accompanying proposed order had apparently been prepared prior to the Pretrial Conference and bore the same date as the Pretrial Conference. Thus, it is evident to the Court that the Applicant participated in the Pretrial Conference and argued its motions in limine and the partial summary judgment motion regarding the tributary claim with full knowledge that it intended to seek dismissal of that claim on that day. As the Objectors did not have proper notice of the motion and since it was not timely under the Case Management Order, the Objectors requested and were granted an opportunity to respond in writing. Accordingly, a briefing schedule was established and a second Pretrial Conference was scheduled for October 10, 1991.

38. Prior to the second Pretrial Conference, the Objectors filed responsive briefs and affidavits arguing that they would suffer legal prejudice if the tributary and related claims were dismissed without appropriate terms and conditions, including provision for payment of their attorneys' fees, costs and expenses for the defense of the tributary and related claims. The Applicant sought dismissal without prejudice and conceded that terms and conditions could be imposed by the Court. At the second Pretrial Conference, the Court orally granted the motion to dismiss without prejudice subject to the condition that the Applicant pay the Objectors their reasonable attorneys' fees, costs and expenses in opposing the tributary

and related claims. At that hearing the Applicant did not seek to offer any evidence and, when advised of the Court's ruling, did not seek to withdraw its motion or request that it be allowed to proceed to trial on the tributary ground water claim. The Court entered its written order on the Applicant's motion to dismiss on November 21, 1991, *nunc pro tunc*, October 10, 1991, and reserved for subsequent determination the amount, if any, to be awarded to the Objectors.

39. In advance of the second Pretrial Conference, the State of Colorado filed a motion to bifurcate the trial if the Applicant's motion to dismiss the tributary claim was granted. By that motion the State sought to limit the first phase of the trial to the issues that the Applicant was required to establish to prevail on its claim to nontributary ground water, reserving for the second phase of the trial any relevant question of mitigation of the injury, if any, shown by the Objectors in the first phase of the trial. The Court granted the motion and by virtue of the dismissal of the nontributary claim ordered herein, there remain no issues to be resolved, and the proposed second phase of the trial is not needed.

V. TRIAL OF THE NONTRIBUTARY CLAIM

> "There is something fascinating about science. One gets such wholesale returns of conjecture out of such a trifling investment in fact."
>
> – Mark Twain

40. The contentions of the Applicant in support of its nontributary claim may be summarized as follows.

The Applicant asserts that whether ground water is nontributary is to be determined by the effect of the pumping on natural streams. Applicant's Supplemental Trial Brief at 12. The Applicant further argues that this impact is to be determined solely by reference to the stream's surface flows, and not the alluvium or other underground water hydraulically connected to the surface stream. *Id.* at 14-17. While conceding that there are numerous natural streams in the Closed Basin of the San Luis Valley, it asserts that with only minor exceptions these streams are not in hydraulic connection with the underlying aquifer systems. *Id.* at 17-18. During the course of trial the Applicant also asserted that once these streams enter the Valley floor they lose their character as natural streams. The Applicant contends that these disconnected streams lose water through most of their reach to the underlying aquifer systems, but that its proposed ground water withdrawals will not increase the amount of stream losses and the water is therefore nontributary.

41. The Applicant acknowledges that the definition of nontributary ground water in §37-90-103(10.5) includes the effect of the proposed pumping on natural streams as defined in §§37-82-101(2) and 37-92-102(1)(b). The Applicant asserts that these sections do not apply to the unconfined aquifer of the San Luis Valley because that aquifer is not a natural stream. For it to qualify as a natural stream the Applicant argues that it must have beds, banks, and a definite channel. In addition the Applicant asserts that the unconfined aquifer is not underflow to any natural stream and is not tributary to any natural stream. On this basis it asserts that the impacts of its proposed pumping on the unconfined aquifer should not

be included in the determination of whether the water it seeks is nontributary.

42. The Applicant also acknowledges that injury to the vested water rights and decreed conditional water rights of others is an issue that this Court must address in determining whether to grant its application for nontributary ground water. *Id.* at 24-31. It argues, however, that the doctrine of "maximum utilization" first announced in *Fellhauer v. People*, 176 Colo. 320, 447 P.2d 986 (1968), effectively precludes any claim of injury by existing underground water rights in the unconfined aquifer. Instead, it argues that such water rights may first have to deepen their wells before complaining of injury. *Id.*

43. The Objectors disagree with both the Applicant's legal theory and factual claims. The Objectors claim that the streams of the San Luis Valley are natural streams that, for some or all of each year and over some or all of their length, are in hydraulic connection with the unconfined aquifer. They contend that the Applicant's pumping will deplete the flow of natural surface streams in an amount in excess of 1/10th of one per cent of the amount of water to be withdrawn annually and, on that basis alone, is tributary. They also contend that the unconfined aquifer and all ground water hydraulically connected thereto is "underground water" as defined in §37-92-103(11) and "waters of the state" as defined in §37-92-103(12), and is therefore water of a natural stream.

44. The Objectors also contend that the Applicant must establish the absence of injury to the vested and decreed conditional water rights to waters of a natural

stream. Each of the principal Objectors, including the State of Colorado, presented evidence of injury to water rights that would occur if the application was granted. Finally, the Objectors contend that the doctrine of "maximum use" relied upon by Applicant is really a doctrine of optimum use that requires the Court to look at all relevant factors, including the environmental impacts of the Applicant's proposed ground water withdrawals. *See Alamosa-La Jara Water Users Ass'n v. Gould*, 674 P.2d 914 (1983).

45. For the reasons stated below, the Court generally finds in favor of the Objectors and against the Applicant. The Court finds that overall the Applicant's evidence was not credible and that the Applicant ignored or distorted fact in it [sic] efforts to establish that the water it sought was nontributary. The principal facts upon which the Court finds against the Applicant and for the Objectors are stated below.

46. This case came on for trial on October 15, 1991, and continued until November 22, 1991. During the twenty-nine days of trial the Applicant presented testimony from eight expert witnesses and one lay witness and introduced a total of 241 exhibits. The four principal Objectors presented testimony from ten expert witnesses and introduced 234 exhibits. Pro se Objector Fred Bauder testified and presented nine exhibits.

47. The Applicant's evidence consisted principally of information about the geology and hydrology of the San Luis Valley. The Applicant incorporated its opinions about the geology and hydrology of the Valley into a ground water flow computer model. The computer model

was then used to make predictions about the impacts of the Applicant's proposed ground water pumping. The Applicant's experts relied upon their views of the Valley's geology and hydrology and the results of the computer model simulations as the basis for their opinion that the ground water the Applicant proposes to withdraw is nontributary as defined in §37-90-103(10.5), C.R.S.

48. The Objectors disputed much of the geological and hydrological evidence offered by the Applicant and contended that the water sought was tributary and its withdrawal would injure the vested water rights and decreed conditional water rights of others. The Objectors likewise disputed the reliability and accuracy of the Applicant's computer model and submitted substantial evidence on these issues. The Objector State of Colorado submitted its own computer model of the San Luis Valley and asserted its results showed the ground water sought by the Applicant is tributary ground water. During its cross-examination and on rebuttal, the Applicant disputed the accuracy of the Objectors' views of the Valley's geology and hydrology, the claimed injury and the reliability of the State's computer model.

49. In order to resolve these conflicting claims and to determine whether the ground water sought by the Applicant is nontributary and whether the application may be granted, it is necessary for the Court to make detailed findings regarding the geology and hydrology of the San Luis Valley and the impact of the Applicant's proposed ground water withdrawals on natural streams and the vested water rights of others. It is also necessary for the Court to make findings regarding the accuracy

and reliability of predictions made by the two computer models received in evidence.

A. GENERAL GEOLOGIC STRUCTURE OF THE VALLEY

50. The San Luis Valley is a north-south trending valley located in south-central Colorado. The Valley is approximately 100 miles long and 50 miles wide, and is bounded on the west by the San Juan Mountains and on the east by the Sangre de Cristo Mountains. It is part of a series of valleys created by the Rio Grande Rift, a major tensional rift which extends from northern New Mexico to just south of Leadville, Colorado.

51. There are three major north-south trending structural features underlying the San Luis Valley. West to east, these have been termed the Monte Vista graben in the western portion of the Valley, the Alamosa horst in the center, and the Baca graben in the east. Horsts and grabens are blocks cut from the crust of the earth by faults. A horst is relatively uplifted block; a graben is relatively downthrown block. The general configuration and location of these features is shown on Applicant's Exhibit 99 and on Objectors' Exhibit US 74, as well as other documents and reports admitted into evidence. These horst and graben structures form the pre-cambrian basement of the San Luis Valley.

52. Overlying the precambrian basement of the Valley are a series of sedimentary and volcanic deposits which are several thousands of feet thick. As a general matter, the Court need only concern itself with the upper sedimentary formations referred to as the unconfined

alluvial aquifer, the Alamosa formation and the Santa Fe group which is comprised of the Santa Fe and Los Pinos formations. The parties agree that, with the possible exception of formations on the very western edge of the Valley, whatever water is capable of being economically developed can only come from these formations.

53. The parties agree that the primary source of depositional materials which have filled the Valley and covered the horst and graben features was the San Juan Mountains. The Sangre de Cristo Mountains have also contributed a significant amount of sediment on the eastern edge of the Valley, but only within a few miles of the mountain front.

54. The depth of the sedimentary deposits in the San Luis Valley is deepest over the Baca graben. This reflects the fact that tectonic activity has been more significant in the eastern half of the Valley, creating a deeper graben which has filled with sediments.

55. The surface materials of the Valley comprise the unconfined aquifer, a layer of sediments composed largely of near surface alluvial sands, gravels and clays which have coalesced over periods of several thousands of years from the streams which deposit materials onto the Valley floor. The source of these materials is the mountains to the west, north and east. These materials are coarse and are characterized by relatively high hydraulic conductivities. Water quality in the unconfined aquifer is good, and the majority of the irrigation wells in the San Luis Valley are completed in this aquifer.

56. Beneath the unconfined aquifer deposits is the Alamosa formation. The Alamosa formation ranges in

thickness from zero at the western edge of the Valley to in excess of 1,200 feet in the Baca graben. The sediments in the Alamosa formation are coarser to the western side of the Valley and become finer as one moves east, becoming predominantly clays with interbedded sands and silty clays in the Baca graben area. At the time that the Alamosa formation was laid down, playa lakes formed in the central San Luis Valley and in the Baca graben which was the deepest portion of the Valley. These lakes resulted in the deposition of lacustrine "blue" clays interbedded with poorly cemented silty sands. These "blue" clays, which are commonly referred to as the "blue clay series," occur over much of the Valley to within 2-3 miles of the Sangre de Cristo mountain front, and form the confining sequence which separates the confined and unconfined aquifers. The parties agree that the clay layers are thicker and more impermeable in the eastern portion of the Valley. These confining clays create an aquitard which impedes the upward movement of water through the Alamosa formation into the unconfined aquifer and, as a result, create the artesian conditions found in the confined aquifer. There is a hydraulic connection between the confined and unconfined aquifers, but the amount and location of water movement between the two is not well understood and varies by location.

57. The top of the blue clay series lies at a depth ranging from 35 feet on the western side of the Valley to approximately 125 feet on the eastern side of the Valley. The approximate limits of the blue clay series are shown on Plate 2 of Water Resources Circular 18, Applicant's Exhibit 30, and on the Isopach Map of the Blue Clay

Series prepared by the State Engineer's Office, Applicant's Exhibit 90.

58. The unconfined aquifer and the confined aquifer, although hydraulically connected at various points, have different hydrologic properties and generally act as two separate hydrologic units. They have long been treated as separate units by the Colorado State Engineer when granting or denying well permits. The water rights within these aquifers have been separately administered by State water officials for at least 30 years. The Applicant's effort to treat the two aquifers as a single aquifer is not based in fact and will not be adopted by the Court.

59. Beneath the Alamosa formation is the Santa Fe Group. To the west it is comprised of what is known as the Los Pinos formation. In its western reach, the Los Pinos formation is characterized by coarse, loose, unconsolidated gravels with high hydraulic conductivity, indicating closer proximity to the principal source of sediment. As one moves east across the Los Pinos and into the Santa Fe, and the distance from the source increases, the sediments become more fine-grained.

60. The evidence established that near the foot of the Sangre de Cristo Mountains, the dominant depositional source in both the Alamosa and Santa Fe formations changes to the Sangre de Cristo Mountains, In this area, the sediments lose their bedded nature, and the blue clay series does not exist.

61. The unconfined aquifer receives water from various streams that flow into the Closed Basin area, irrigation return flows, ground water recharge facilities deriving water from the Rio Grande and Closed Basin

streams, and return flows that result from irrigation water pumped from the confined aquifer. The unconfined aquifer also receives unquantified but apparently small amounts of recharge from precipitation and upward leakage through the confining clay series from the confined aquifer.

62. The confined aquifer is primarily recharged at the edges of the Valley. As inflow enters the Valley from the surrounding mountains, water is recharged to the aquifer through the alluvial fans, fractures in volcanoclastic formations and deep percolation through the coarser sediments at the Valley edges where the confining blue clay series is absent. The source of this water is principally leakage from streams passing over these coarse sediments at the Valley's edges. There are those who claim that the confined aquifer receives significant deep ground water inflow from the surrounding mountains, particularly from the San Juans. There is a wide range of opinions as to the quantity of inflow to the confined aquifer from the San Juans, ranging from approximately 485,000 acre-feet per year according to Dr. Huntley's thesis, Applicant's Exhibit 40, to 10,000 to 30,000 acre-feet per year according to the testimony of Mr. Philip Emery, the principal investigator for the extensive studies of the San Luis Valley carried out by the U.S.G.S. in the late 1960's and early 1970's.

63. While the surface inflow appears to have been fairly thoroughly investigated, the Court concludes the evidence presented about the amount of ground water inflow recharging the confined and unconfined aquifers is, at best, an educated guess. The quantification of this

ground water inflow has previously been made by construction of water budgets to balance assumed inflows and outflows. Ground water inflow from the San Juan Mountains has been used as a balancing term to provide an additional source of inflow to counter-balance assumed outflows. An example of the type of variance that can occur in assumptions about ground water inflow in water budgets is well-illustrated by Applicant's Exhibit 76. There the inflow estimates vary from zero acre-feet per year to 721,000 acre-feet per year. From this it can readily be seen that the assumptions made about one or more components in a water budget can drive, or be driven by, the quantities chosen for other components of the water budget.

64. The limited evidence available regarding the existence of ground water inflow into the valley fill sediments is inconsistent with large quantities of ground water inflow. The available evidence on water quality and water circulation in the confined aquifer suggests that the water in the confined aquifer, particularly at depth, has not been moving. The absence of movement of this ground water is inconsistent with any substantial quantities of deep ground water inflow from the San Juan Mountains. The Court finds that the methodology used by Mr. Huntley to arrive at the estimates in his thesis, and the values adopted by Messrs. Hearne and Dewey in their report, Water Resources Investigation Report 86-4113, Hydrologic Analysis of the Rio Grande Basin North of Embudo, New Mexico, Colorado and New Mexico, 1988, ("WRI 86-4113"), Applicant's Exhibit 42, and their respective estimates of this ground water inflow from the San

Juans are simply not sufficiently reliable to be given credence by the Court.

B. ROLE OF FAULTING IN THE SAN LUIS VALLEY'S HYDROLOGY

65. Faulting is extensive and complex throughout the San Luis Valley. Significant faulting is present in both the Monte Vista and Baca grabens. The faulting is due in large part to the tensional system of the Rio Grande Rift. As the rift expands in an east-west direction, it relieves horizontal stresses on the rocks, and the vertical stress of gravity becomes the driving force. As a result, units of material are displaced downward relative to other units, creating what are called "normal" faults.

66. As faulting was occurring in the Valley, deposition of sediment was also occurring. As a result, units of sediment were deposited over a displacement caused by faulting. At some later time, the fault moved again resulting in further displacement, followed by deposition of more sediments, further movement of the fault, further deposition of sediments, and so on. The faults created by this process of nature are known as "growth faults." Within a growth fault, the displacement between fault blocks increases with depth, or conversely, decreases as one approaches the surface.

67. The evidence indicated that although displacement of some of these growth faults penetrates into the blue clay series, and perhaps even to the surface at some limited locations, many others end below the confining clays. This occurs as movement on the fault ceases and

sedimentation fills the downdrop side and the overlying sediment beds are laid down without displacement.

68. "Normal" faulting in the San Luis Valley does not occur in a 90 degree vertical plane. This is apparent on the various seismic lines introduced by the parties. As a result, in the faulting process, one side of the broken rock unit slides over the other side. This plane of movement, together with the rock on either side of the plane which is fractured in this process, was referred to by experts of all parties as a fault zone. Fault zones are associated with the faulting that historically occurred in the San Luis Valley.

69. As rock units grind against each other in the faulting process, gouge material can be created. Gouge or fault smear, as it is sometimes called, is the fine-grained material created when rock grinds against rock as movement occurs along a fault, or may be the fine-grained particles of clay comprising the rock itself. This material may fill the space in a fault which is created by the movement of the rocks. Clay materials are more likely to smear or to form gouge than harder, more lithified or indurated (rock-like) materials.

70. Fracturing or faulting of rock may either enhance or inhibit movement of water or other fluids along the fault plane and within the fracture zone. The evidence indicated that both circumstances occur in the San Luis Valley. Where gouge has been created in a fault zone, it can act to decrease permeability and inhibit the flow of water within or through that fault zone. Faulting can enhance the potential for water movement by creating areas of increased permeability. Where faulting

enhances the flow of water, the vertical flow of water is enhanced only within the fracture zone.

71. The Applicant's principal expert on the nature and location of faults in the San Luis Valley was Dr. John Everett. He was commissioned to study faults in the Valley with particular focus on the faults in the eastern and northern portions of the Baca graben near the Applicant's property. As a consequence, he had not investigated and was not able to testify about the location and extent of faults in the Monte Vista graben, although he conceded that faults must and do exist there and have the same properties as those in the Baca graben. The Applicant's expert, Mr. Robert Brogden, relied upon Dr. Everett for the location of faults in the San Luis Valley.

72. Dr. Everett described the fracture zones associated with faults in the Valley as being a few feet to tens of feet wide, with a few zones being perhaps a hundred or more feet wide. This testimony is corroborated by the Applicant's expert, Mr. Townsend. Dr. Everett also testified that the area of the Valley is very large compared to the area occupied by the fracture systems. It was his opinion that within a fault zone or band, the fault's ability to move water vertically, as measured by its vertical conductivity, is enhanced only 4 to 10 times over that of the unfaulted surrounding materials. In other words, the amount of flow potentially moving upward through a fault or fracture zone, is only 4 to 10 times greater than the amount of flow that could move up through the same material in the absence of any faults or fracture zone.

73. Mr. Brogden was the Applicant's principal expert witness on the geology and hydrology of the San

Luis Valley and the alleged nontributary nature of the ground water claimed. A portion of his testimony concerned his interpretation of the hydrologic significance of faults and fracture zones in the San Luis Valley. According to Mr. Brogden, the fault and fracture zone having the most hydrologic significance is located in that area of the Baca graben where the confining clay series is present. *See* Applicant's Exhibit 143. This area is very near Applicant's property and exceeds 200 square miles in area as depicted by Mr. Brogden. Mr. Brogden testified that in his opinion the same faulting described by Dr. Everett enhances average vertical conductivity 100-fold *everywhere* within that 200 square mile area even though the actual area occupied by the fault and fracture zones is only a small fraction of that area. It was Mr. Brogden's opinion that these faults and fracture zones operated to bring ground water from the confined aquifer, deep in the Baca graben, to the upper portions of the confined aquifer and unconfined aquifer. This testimony is fundamentally at odds with the opinions of the Applicant's other experts Dr. Everett and Mr. Townsend.

74. Mr. Brogden's assertion does not find any rational or credible support in the record. The testimony of Applicant's own witness, Dr. Everett, as well as the testimony of Objectors' expert, Mr. Harmon, regarding the relative degree of water movement in faults, together with the testimony of the Applicant's witnesses, Dr. Everett and Mr. Townsend, regarding the valley-wide distribution of faulting are completely inconsistent with Mr. Brogden's opinions regarding the role of faults in moving water into the upper portions of the confined aquifer and into the unconfined aquifer. According to the

calculation made by the Objectors' expert, Dr. Sharma, for the actual faults to have the effect ascribed to them by Mr. Brogden, they would have to have a vertical conductivity some 100,000 to a million times greater than the surrounding materials. The Court finds Mr. Brogden's opinion to be without basis in fact.

75. Mr. Brogden also relied upon paired hydrographs from wells allegedly completed into the confined aquifer and unconfined aquifer to support his opinion of the role of faults. He asserted that the similar pattern of fluctuations in the hydrographs showed the movement of water from the confined aquifer to the unconfined aquifer through the fault and fracture zones. This evidence was not persuasive. The virtually identical water levels in the paired wells appear to indicate only that both wells are completed into the unconfined aquifer. If in fact these hydrographs were to be accepted for the proposition advanced by Mr. Brogden, the characteristics ascribed to the faults by Mr. Brogden would have effectively eliminated the confining nature of the blue clays in the fault area on the Valley floor near the Applicant's Baca property. This would result in the elimination of artesian pressure in this area. However, Mr. Brogden's own testimony verifies that there is in fact artesian pressure in the confined aquifer in the area of the paired hydrographs as demonstrated by flowing confined aquifer wells.

76. Mr. Brogden also relied for his conclusions on a series of so-called "leaky artesian curves" resulting from the test pumping of wells in the unconfined aquifer. Applicant's Exhibits 146 through 166. He was of the opinion that certain test pump results from unconfined aquifer wells in the alleged faulted area on the Valley

floor north of the Rio Grande show evidence of leakage that he attributed to the existence of faults.

77. This analysis compares the actual drawdown curve observed from the pump test of a well to the idealized Theis drawdown curve. *See* Objectors' Exhibits RG 68 and RG 69. These deviations are said to be indicative of leakage from an underlying aquifer. Based on the testimony presented at trial, the types of departures from the idealized Theis curve shown on these exhibits can be explained by a number of different factors, including delayed drainage from the unconfined aquifer. Given the interbedded characteristics of the unconfined aquifer, it is more probable that the deviations in the curves are principally a function of delayed drainage, or perhaps a combination of both delayed drainage and upward leakage from the confined aquifer. However, both of these conditions can exist without the presence of faults. The Court finds this evidence to be unpersuasive on the existence of faults as conduits for ground water flow.

78. The evidence presented by the Objector's expert, Mr. Harmon, and the Applicant's rebuttal expert, Ms. Gries, as well as some of the many reports submitted into evidence by the Applicant, show that water quality substantially decreases with depth in the San Luis Valley. The only evidence presented established that 2,000 to 3,000 feet below land surface there is a substantial amount of total dissolved solids ("TDS"), and at about 5,400 feet below land surface a TDS concentration of 10,000 parts per million was encountered in an oil and gas test well. This high level of TDS indicates very long retention time for water in the confined aquifer. This is

further evidence that faulting does not produce significant water movement in the confined aquifer as suggested by Mr. Brogden. No evidence of water quality degradation in the shallower portions of the confined aquifer was presented to substantiate the upward movement of poor quality water from depth in the quantities suggested by Mr. Brogden.

79. There is no credible basis in the evidence for assigning a large hydrologic role to fault and fracture zones in sediments underlying the Valley floor, or for the use of an inflated vertical hydraulic conductivity in these fault and fracture zone areas. The Court finds, based on the evidence presented, that faulting has little or no effect on vertical hydraulic conductivities in all or a significant portion of the sediments underlying the Valley floor, and there is no sound basis for modeling 200 square miles of enhanced vertical hydraulic conductivity, as has been done by Mr. Brogden. In fact, the Applicant's testimony regarding sensitivity runs of its computer ground water model demonstrated that if realistic vertical hydraulic conductivities had been used by it in the fault and fracture zones, the Applicant's own model would show that its proposed pumping would deplete the Rio Grande and other natural surface streams in an amount greater than 1/10th of one percent of the amount withdrawn annually by the 100th year.

C. RIVERS AND STREAMS

80. There are three principal drainage basins located in the San Luis Valley. The largest is the drainage basin of the Rio Grande above its confluence with the

Conejos River near La Sauces. The Rio Grande drains a substantial portion of the San Juan Mountains in Hinsdale, Mineral, Rio Grande and Saguache Counties in Water Division No. 3. The Rio Grande enters the Valley floor near the Town of Del Norte and then flows generally south and east near the Cities of Monte Vista and Alamosa. At Alamosa, it turns south, passes through the San Luis Hills and continues south into the State of New Mexico. The Rio Grande has a number of tributaries which join it on the Valley floor including the Alamosa River, La Jara Creek, Trinchera Creek and Culebra Creek.

81. The second principal drainage basin in the San Luis Valley is the Conejos River basin. The Conejos River basin, like the Rio Grande, drains a substantial portion of the San Juan Mountains. The principal tributaries of the Conejos River are the Los Pinos and San Antonio. The Conejos River joins the Rio Grande at La Sauces and the waters it contributes to the Rio Grande flow south into New Mexico.

82. The third principal drainage is north of the Rio Grande in an area known as the Closed Basin. The Closed Basin is distinguished from the remainder of the Valley by a low topographic divide and a ground water or "hydraulic" divide. The approximate boundaries of the Closed Basin are shown on Plate 1 of Water Resources Circular 18, Applicant's Exhibit 29. The effect of both the topographic divide and the ground water divide is that water entering the Closed Basin does not flow, either on the surface or in the unconfined aquifer, to the Rio Grande. The Closed Basin is the natural drainage for a portion of the San Juan Mountains on the west and north and the Sangre de Cristo Mountains on the east.

Numerous streams come off these mountains and supply water to the Closed Basin and to the unconfined and confined aquifers. The two principal drainages located within the Closed Basin area are Saguache Creek and San Luis Creek. The Closed Basin also receives a substantial supply of water imported by ditches and canals from the Rio Grande. Also located within the Closed Basin area is the U.S. Bureau of Reclamation's Closed Basin Project, the Great Sand Dunes National Monument, and the Blanca Wildlife Habitat Area.

83. The waters of both the Rio Grande and the Conejos River are subject to the Rio Grande Compact. The water rights on those streams are administered annually to insure compliance with Colorado's obligation under the Compact.

84. Based upon the evidence presented, as discussed below, the Court finds that the Rio Grande, Conejos River, Alamosa River, La Jara Creek, Trinchera Creek, Saguache Creek, San Luis Creek and their tributaries are all natural streams with defined channels, alluvium and underflow. The Court also finds that the ground water in the sands, gravels and clays of the unconfined aquifer of the San Luis Valley, including the Closed Basin, and the ground water hydraulically connected to the unconfined aquifer are tributary to the alluvium of the natural streams in the Valley. The Court further finds that the unconfined aquifer in the San Luis Valley is in direct hydraulic connection with the alluvium and surface flows of the natural streams of the Valley. The Court also finds that the withdrawal of ground water proposed by the

Applicant will influence the rate and direction of flow of ground water in the unconfined aquifer, in the alluvial aquifers of natural streams in the Valley and the surface flows of those natural streams.

85. The surface streams entering the Closed Basin and their associated ground water flow toward the eastern side of the San Luis Valley where they collect in an area referred to by many witnesses as the "sump." The sump is defined as the lowest point in the Closed Basin and is located at or near San Luis Lake. The waters reaching the sump have historically been discharged by evaporation and evapotranspiration.

86. A portion of the waters flowing into the San Luis Valley enter the confined aquifer along the Valley margins, maintaining the artesian head in the confined aquifer. A reduction in the quantity of water within the confined aquifer caused by increased pumping, as proposed by the Applicant, will result in increased recharge along the Valley margin, resulting in less water entering the unconfined aquifer and depletions to the flow of the streams of the San Luis Valley.

87. Throughout the San Luis Valley, both within and outside the Closed Basin, the rivers and streams constitute natural streams, as the term is used in the Colorado law. Without exception, these streams have defined channels as they issue from the mountains and cross the Valley floor. In the Closed Basin region, those defined stream channels generally continue across the Valley floor. In some locations, the stream channels are braided as the streambed gradient flattens, but a defined course

of flow is nonetheless evident. In other cases, the activities of man have resulted in the modification of the natural stream channel due to construction of irrigation works or other changes, but the flow in the streams continues down the modified channels and toward San Luis Lake.

88. The evidence adduced from the Applicant's witness, Dr. Everett, and shown by his photographic exhibits, clearly depicts the existence of the defined stream channels for the Closed Basin streams. In addition, the color-infrared photography and Dr. Everett's testimony identified the existence of alluvial channels associated with the surface channels of those streams. These facts were likewise established by Objectors' witnesses, Messrs. Davey and Boddie, and the Division Engineer, Mr. Vandiver. The Court finds that the testimony of these individuals and the investigations they made are credible and establish the existence of these natural streams from their point of issuance at the mountain front across the Valley floor to the sump of the Closed Basin at San Luis Lake. The Court further finds that the interpretation of the physical fact by the Applicant's expert, Mr. Brogden, and his denial of the existence of such natural streams and their alluvium were not credible or reliable. The great weight of the evidence adduced in this proceeding establishes the existence of an alluvial channel associated with all of the streams in the San Luis Valley, including those with intermittent flow.

89. The streams in the San Luis Valley are subject to an annual hydrologic cycle. In the spring and early summer the streams are full of water from the melting snow. The flows gradually diminish and by the fall, portions of

some surface streams become dewatered. This phenomenon does not mean that the streams' alluvium is similarly dewatered. Simply because a stream does not have a permanent flow on the surface does not mean it is not a natural stream and cannot be impacted by ground water withdrawals.

90. Flows in the channels of the intermittent streams in the Closed Basin area depend upon snow melt, runoff and precipitation and upon the level of use of vested water rights diverting from the streams. In high water years when the precipitation and runoff are above average, the streams on the floor of the San Luis Valley tend to flood out of their channels. The ground water system becomes full and water flows across large areas of the sump of the San Luis Valley. Based on the testimony of Messrs. Davey, Vandiver and others, the Court finds that in years of high runoff the vast majority of these Closed Basin streams have a continuous flow in defined channels from the mountains and across the Valley floor, and that those waters make their way to San Luis Lake.

91. The Court finds to be unreliable Mr. Brogden's assertion that water appearing in the stream channels on the Valley floor and within the sump of the San Luis Valley is simply a surface expression of ground water and that it is not related to streamflow. Based on the testimony of Messrs. Vandiver, Davey and others, the Court finds that the ground water in fact rises as a result of increased streamflows into the Valley during the runoff season and that there is in fact a correlation between the streamflows and the rise in ground water levels. The Court further finds that it is the annual rise in the ground

water table which permits the streams to fill their channels to a greater and greater extent, to flow across the floor of the Valley and eventually reach San Luis Lake; it is this mechanism which allows the streams to deliver water to the headgates of surface water rights on the floor of the Valley and to fill the storage rights held by the Division of Wildlife and others in Head and San Luis Lakes.

92. The Applicant contends that by 1980, there had been a break in the hydraulic connection between the Rio Grande and the underlying aquifer from Del Norte to east of Monte Vista, at Alamosa, and at the confluence of Trinchera Creek. The Court finds that the ground water measurements and observations made by Mr. Davey and the seepage runs undertaken and observations made by the Division Engineer are more thorough and persuasive than the limited field work performed by Applicant's engineers. The Court therefore finds that the Rio Grande from Del Norte to the state line is in hydraulic connection with the underlying ground water during all or a portion of each year. The Court further finds that there are circumstances in which the Rio Grande may temporarily break hydraulic connection with the ground water table near Del Norte, but that the connection is naturally reestablished.

93. The Court finds that the ground water in the unconfined aquifer is in hydraulic connection with most surface streams in the San Luis Valley and their alluvium for all or portions of most years. Further, the evidence showed, and the Court finds that the hydraulic connection between the unconfined aquifer and the surface streams affects the rate of leakage from the streams.

Where the water table is above the stream, the gradient is from the water table to the stream, and the stream gains. Where the water table is at or somewhat below the water level in the stream, a "mounded" water table occurs connecting the stream and the aquifer. The gradient between the stream and the aquifer in this situation is less than the maximum gradient that would exist if the stream and aquifer were hydraulically disconnected. As a result the stream is "losing", but at less than the maximum rate of loss. The unconfined aquifer, and the hydraulic connection between that aquifer and the streams influences the rate of loss (or gain) through any particular stream reach, and therefore the rate and direction of flow in those streams.

94. The Applicant contends, based upon limited field investigations, that except for short reaches of San Luis Creek and Saguache Creek, none of the streams entering the Closed Basin are in hydraulic connection with the unconfined aquifer. These limited investigations included estimates of water levels and streambed depths from U.S.G.S. quad maps and other published data, and limited field checking of streamflow conditions and water levels. This contrasts markedly with the extensive field work conducted by Objectors' witnesses, Messrs. Davey and Boddie, and Dr. Cooper and the Division Engineer. Their work included seepage runs on creeks and streams, surveying stream water levels and comparing those with actual surveyed and measured ground water levels, the installation of numerous monitoring wells, and many days of field work and observations. Based upon the evidence presented, the Court finds that for all or part of their length the following natural streams and their

alluvium are in hydraulic connection with the unconfined aquifer in the Closed Basin of the San Luis Valley: San Luis Creek, Saguache Creek, Big Spring Creek, Sand Creek, Medano Creek, Cottonwood Creek, Crestone Creek, Kerber Creek, Rio Alto Creek, San Isobel Creek, Deadman Creek, Carnero Creek, LaGarita Creek, Russell Creek, Werner Arroyo, and Spring Creek Branch of San Luis Creek (also known as Rock Creek). This listing is *not* intended to be exclusive.

95. San Luis Lake and Head Lake are naturally occurring lakes which obtain their source of supply from surface flows of San Luis Creek and its tributaries, including Saguache Creek and its tributaries, as well as surface flows of Sand Creek and Big Spring Creek, together with the alluvial underflow of those streams and ground water within the unconfined aquifer of the Closed Basin.

96. One of the natural streams near the Applicant's Baca property is Big Spring Creek. The uncontroverted evidence established that Big Spring Creek is a gaining stream on a year-round basis from its source at Indian Springs at least to the point where the Ojos Ditch, the furthest upstream headgate, is located. Through that 3-1/2 mile gaining reach, the only source of water to the creek is spring flow from the unconfined aquifer. The evidence further shows that during all or portions of the year, Big Spring Creek is a gaining stream throughout its entire reach. Big Spring Creek flows as far as Head and San Luis Lakes where it terminates. Big Spring Creek, together with the return flows from irrigation, provide an actual and decreed source of supply for the water storage

rights in Head and San Luis Lakes. *See Medano Ditch Co. v. Adams*, 29 Colo. 317, 68 P. 431 (1902).

97. Being the sole source of water to the upper portion of Big Spring Creek, the unconfined aquifer obviously influences the rate and direction of flow of the Creek. The Court therefore finds that the unconfined aquifer is in hydraulic connection with Big Spring Creek and its alluvium, and that the aquifer is tributary to Big Spring Creek.[4]

98. Gain/loss studies performed by the Division Engineer's staff show that the flow in Big Spring Creek is on the order of 5-6 c.f.s. even in the drier portions of the year. Diversion records for the Ojos Ditch indicate that diversions from Big Spring Creek during the irrigation season range up to 3,000 acre-feet per year, with most years recording over 1,000 acre-feet of diversions.

99. The Applicant did no field work to investigate Big Spring Creek, but was provided with at least one gain/loss study showing Big Spring to be a gaining stream. However, the Applicant did not analyze the depletions or impacts of its projected drawdowns on Big Spring Creek because its engineers considered Big Spring Creek to be a losing stream not in hydraulic connection with the unconfined aquifer. The Applicant did not ever look at the impacts on water rights diverting from Big Spring Creek, including the water storage rights of the

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[4] As an historical note, in 1902 the Colorado Supreme Court affirmed the trial court's finding that the waters of Big Spring Creek were in hydraulic connection with the ground water. *Medano Ditch Co. v. Adams, supra.*

Division of Wildlife and others in Head and San Luis Lakes.

100. The drawdowns in the unconfined aquifer under Big Spring Creek, as projected by the Applicant's own model and shown on Applicant's Exhibit 266, range from 25 to 75 feet. The drawdowns predicted by the State's model are about 32 feet. The uncontroverted testimony of Mr. Boddie was that such a reduction in the ground water table would cause the upper portions of Big Spring Creek above the Ojos Ditch to cease flowing. Based on the only evidence presented, the depletions to Big Spring Creek would be approximately 3,600 acre-feet per year, well in excess of the 1/10th of one percent of pumping required to find the water claimed by the Applicant to be nontributary. The Applicant made no credible effort to rebut Mr. Boddie's testimony on this point. The Court finds the evidence to clearly show that the ground water which Applicant proposes to pump is tributary to Big Spring Creek.

D. CLOSED BASIN PROJECT

101. Water entering the Closed Basin not consumed by irrigation or by naturally occurring vegetation flows either on the surface or underground to the topographic low in the Closed Basin near Head Lake and San Luis Lake. At that point the water was historically discharged by evapotranspiration from open water surface and the soil, or by the native plant life.

102. Over the recent history of the San Luis Valley, there have been a number of proposals for capturing this

water that was otherwise lost to evaporation and transpiration and delivering it to the Rio Grande. This possibility is reflected in Article VIII of the Rio Grande Compact, §37-66-101, C.R.S., signed in 1938, and is discussed generally in the report "Ground-Water Resources of the San Luis Valley, Colorado," by William J. Powell, prepared by the Colorado Water Conservation Board, the U.S. Geological Survey and the United States Bureau of Reclamation, dated June, 1958, and admitted as Applicant's Exhibit 25. *See also Closed Basin Landowners Ass'n v. Rio Grande Water Conservation Dist.*, 734 P.2d 627 (Colo. 1987).

103. In 1972 the United States Congress authorized the construction of the Closed Basin Unit of the San Luis Valley Project. P.L. 92-514, as amended. The goal of the Closed Basin Project is to lower the water levels in the unconfined aquifer within the Project area by the construction of a large number of shallow wells, and thereby reduce the amount of water lost to evaporation and transpiration. This lowering of the water table is carefully monitored and subject to a variety of mitigation requirements. The water diverted is delivered to the Rio Grande for the purposes authorized by Congress, including aiding the State of Colorado in meeting its delivery obligations under the Rio Grande Compact.

104. The Closed Basin Project, decreed by this Court in Case No. W-3038, is entitled to divert 117,000 acre-feet annually of tributary ground water from the unconfined aquifer of the Closed Basin. The source of supply for the Closed Basin Project is ground water inflow into the Project area, as well as surface water inflow down San Luis Creek and its tributaries, Big Spring Creek and Sand

Creek. In addition, the Project receives surface water flows from time to time entering the Project area through various lateral ditches and drains emanating from the agricultural area to the west of the Closed Basin Project. In addition, the Closed Basin Project receives water supply from ground water moving into the Project area from the north, east and west. The exhibits introduced by the Applicant and the Objectors display ground water contours which establish that the ground water moves into the Closed Basin Project area, and the Court finds that the evidence introduced at trial confirms that the Closed Basin water supply is dependent upon both ground water and surface water flows into the Project area.

105. Testimony at trial proved that even under the projections of the Applicant's computer model, Applicant's proposed ground water withdrawals would decrease the yield under the Closed Basin Project in excess of 38,000 acre-feet annually. The actual impacts could be far greater.

106. The Applicant spent a great deal of time at trial attempting to justify its project by a comparison to the alleged impacts of the Closed Basin Project. The Comparison is inappropriate. The Closed Basin Project was authorized by Congress after extensive study by several federal agencies, including the U.S. Bureau of Reclamation and U.S. Fish & Wildlife Service. The impacts of the Closed Basin Project were considered at that time; the Project's design took those impacts into consideration; and the authorizing legislation contains terms and conditions in order to insure that the Project is operated in the manner contemplated by Congress. Impacts from the Closed Basin Project were considered at the time the Project was

authorized and at the time the Project water right was decreed by this Court. The appropriate terms, conditions and protective measures were agreed upon and are being implemented. The Closed Basin Project is nearing completion and its water rights must be recognized by this Court and are relevant to the determination of the nature of the water sought by the Applicant and injury to other vested water rights and decreed conditional water rights.

107. The flows of San Luis Creek and its tributaries, Saguache Creek and its tributaries, Sand and Big Spring Creeks, all contribute to the water supply available to the Closed Basin Project and to the mitigation features of the Project, including Head and San Luis Lakes, and the wetlands established and maintained by the Colorado Division of Wildlife in the vicinity of Head and San Luis Lakes. Diminution in flows of any of those streams or their tributaries will result in injury to the water rights of the Closed Basin Project and its mitigation features, as well as the storage rights for Head and San Luis Lakes.

E. FEDERAL RESERVED WATER RIGHTS

108. The Great Sand Dunes National Monument (hereinafter "Monument") was established, pursuant to the Antiquities Act, 16 U.S.C. S 431, by Presidential Proclamation on March 17, 1932, 47 Stat. In this Court's Case No. 81CW164, the United States of America claimed reserved rights in certain waters in, on, under, adjacent to, or otherwise appurtenant to the land described by the Proclamations which created the Monument.

109. The primary purpose of the Monument, as recognized by this Court in the decree in Case No. 81CW164,

is preservation of the great sand dunes and additional objects of scenic, scientific, and educational interest. Certain creeks flowing through the Monument, including Medano, Sand and Castle Creeks, exhibit a rare phenomenon known as "pulsating" or "surge flow." This Court has previously recognized that this phenomenon is of scientific, educational and scenic interest.

110. Instream flows in the amounts necessary to preserve the great sand dunes, the pulsating flows and additional objects of scenic, scientific and educational interest were decreed to the United States by decree of this Court dated June 30, 1989, in Case No. 81CW164.

111. This Court has also decreed reserved water rights for numerous springs located on public land administered by the Bureau of Land Management, pursuant to Public Water Reserve No. 107, April 17, 1926. *United States v. City and County of Denver*, 656 P.2d 1, 31 (1982). Case Nos. 81CW144 through 147 and 82CW57 and 58. These decrees are for very small amounts of water which the Court found to be necessary for human and animal consumption.

112. In order to enter a decree granting the relief requested by the Applicant, this Court must determine, *inter alia*, that Applicant's pumping will not materially injure any other vested water right. The Court notes that pursuant to §§37-90-102(2), 37-90-137(2) and 37-90-137(4) it is charged with protection of appropriative rights in the natural stream system. This must include a finding that the federal reserved water rights decreed from the natural stream system to the Monument and the Public Water

Reserves will not be materially injured. The Applicant has not met this burden.

113. The persuasive evidence presented at trial demonstrated that at times when Sand Creek is flowing, it is in hydraulic connection with the unconfined aquifer. The evidence presented by the Objectors' witnesses indicated that a mounded water table is created connecting the stream to the regional water table which is within a few feet of the ground surface. A mounded water table is created when the water leaking from a stream builds a "mound" of water on top of the water table. Where the regional water table is sufficiently close to the bottom of the stream, the mound creates a connection between the stream and the unconfined aquifer. These mounded water tables change the gradient between the streambed and the aquifer and decrease the amount of leakage from the stream. On Sand Creek, this allows a smaller amount of inflow to be able to maintain a live surface stream in the Monument. The evidence indicates that the presence of the regional water table within a few feet of the bottom of Sand Creek is important to the maintenance of a live surface flow and, therefore, the pulsating flow in Sand Creek.

114. The scant evidence presented by Applicant to support its claim that Sand Creek is never in connection to the regional aquifer is unpersuasive in the face of the far more extensive field work and direct observations presented by the Objectors' witnesses, Mr. Boddie and Mr. Harmon. The Court finds that Sand Creek is in hydraulic connection with the underlying aquifer during portions of every year.

115. Evidence presented by the Applicant in Exhibit 266 demonstrated that under the drawdowns predicted by its own model, the regional water table would be drawn down between 75 and 150 feet under Sand Creek, and in excess of 25 feet under Medano Creek. Drawdowns predicted by the State Engineer's model are in excess of 32 feet under Sand Creek.

116. Drawdowns of the magnitude predicted by the Applicant's own model, as well as the State Engineers' model, would prevent the creation of a mounded water table connecting Sand Creek and the unconfined aquifer, thus causing greater leakage from the stream and reducing the streamflows. This reduction in streamflow would impact the pulsating flows and other natural processes in Sand Creek and injure the instream flow water rights decreed to the United States.

117. The testimony of William Bellis, an expert in hydrogeology, established that pumping 200,000 acre-feet from the Baca alone or in combination with pumping from Villa Grove would also impact some of the Public Water Reserve Springs. The testimony of Mr. Davey corroborated Mr. Bellis' opinion.

118. The impacts of AWDI's proposed withdrawals on the reserved water rights decreed under the Public Water Reserves, and for the Great Sand Dunes National Monument have not been quantified in numerical terms. However, no such quantification is necessary. The impact that would be caused by the Applicant's proposed ground water withdrawal on the reserved rights of the United States is injury as a matter of law because those rights are quantified as a matter of federal law as only the

amount necessary to fulfill the respective purposes of the reservations. *Cappaert v. United States*, 426 U.S. 128, 141 (1976); *United States v. Denver*, 656 P.2d 1, 20 (Colo. 1982). Based upon the evidence, however, this Court can readily find, as a matter of both federal and Colorado law, that the federal reserved water rights would be materially injured by the Applicant's proposed ground water withdrawals.

F. VILLA GROVE

119. The testimony of Mr. Brogden and Messrs. Davey, Vandiver, and Bellis is in agreement and establishes that the water in the vicinity of Villa Grove is, in fact, tributary ground water and no nontributary water exists at that location. Accordingly, the ground water sought by the Applicant under its Villa Grove property is tributary ground water and no nontributary ground water exists underlying that land.

120. The ground water in the Villa Grove area is in hydraulic connection with the large area of springs located along San Luis Creek and Kerber Creek and their tributaries. The springs are a source of supply for those streams. The Applicant did not address in its model the impact of its proposed pumping on the flow of those springs, but the testimony of Messrs. Bellis and Davey, the Objectors' witnesses, as well as of the Division Engineer, establish that any additional ground water withdrawals in the Villa Grove area would result in diminution of flow or elimination of flow from the springs with resulting injury to the United States' water rights in certain identified springs, as well as to water

users taking their source of supply from San Luis Creek, Rock Creek and Kerber Creek.

121. The Court specifically finds that the ground water in the area around Villa Grove is in hydraulic connection with San Luis Creek and its tributaries, and additional pumping in that area will result in material injury to surface water rights taking their source of supply from those streams.

G. IRRIGATION AND RECHARGE

122. The evidence establishes that irrigation and recharge practices play an important role in hydrology of the San Luis Valley. Annually, substantial quantities of water are diverted from the surface streams and used to supply the vast acreages of farm lands in the San Luis Valley. The streams have high flows in the spring and early summer with greatly diminished flows thereafter. This water supply has proven too erratic for modern agriculture in the San Luis Valley. Accordingly, many farmers use the confined and unconfined aquifers as a supplemental source and, occasionally, as the sole source of water for irrigation. The municipalities of the San Luis Valley are also largely, if not wholly, dependent upon these aquifers for their water supplies.

123. While there is agricultural development throughout the San Luis Valley, the manner of irrigation of these lands varies from location to location. Throughout the Valley, but predominantly in the Closed Basin area, irrigation with center pivot sprinkler systems is common. That area contains over 1,000 center pivot sprinklers. Center pivot sprinkler systems generally irrigate

approximately 130 acres per pivot, although pivots can irrigate far greater acreages if set up to do so.

124. Center pivot irrigation systems can obtain their water supply either by means of wells, from surface supplies or from both. Many of the center pivot irrigation systems, including the majority of those located in the Closed Basin area, obtain their water supply from the unconfined aquifer. Others obtain their water supply from wells tapping the confined aquifer or from ditches and canals carrying surface water.

125. Prior to the extensive use of wells for irrigation, water users in the San Luis Valley were dependent on surface water supplies. As recognized by this Court in Case No. W-3979, Applicant's Exhibit 433, when referring to the Rio Grande Canal's delivery of water into the Closed Basin area:

> 16. Irrigation in this area of the San Luis Valley began with the diversion of water from the Rio Grande through an extensive network of canals. From the earliest days of irrigation the method of subirrigation or "subbing", was practiced by the water users under the Rio Grande Canal. Seibenthal in 1910 described the practice of subirrigation as "universal". Subirrigation was accomplished by allowing water to percolate through the soil until the water table raised to or near the root zone of the crops. By continued diversion of river water and by installation of a series of check dams, the water table was regulated so as to hold the proper level to sustain subirrigation. The porous, sandy soil found in the Closed Basin permitted rapid percolation of water and contributed to the efficiency of the subirrigation practice. (Citations omitted.)

17. The subirrigation practice produced a shallow groundwater aquifer, essentially artificial in nature, developed over a period of years by the infiltration of surface water applied for irrigation. This artificial aquifer is what is now known as the unconfined aquifer. *See Powell* at pages 56-57.

18. The practice of subirrigation was criticized for many years by outside observers. They attributed to it the San Luis Valley's water logging and salinity problems. However, this unique mode of irrigation was highly efficient from the point of view of water users. It eliminated many capital and labor costs. Most importantly, subirrigation allowed water users to make parallel their water supply and the actual demand of growing crops. The necessity for achieving parallel timing stems from the fact that the Rio Grande is a typical western stream in that it has a relatively short period of high flow. Crop demands, however, continue long after the peak flows have passed and water available for direct flow diversion is less than sufficient. Because the practice of subirrigation maintained an underground water reservoir after the peak flows had passed water was available to the crops for an extended period, thus circumventing the water supply timing problems inherent in a western surface irrigation system. So long as sufficient water was available to sustain the practice, the water users held firmly to subirrigation despite criticisms from outsiders.

* * *

22. The advent of center pivot sprinklers once again changed the irrigation practices in

> the Closed Basin. Sprinkler irrigation has increased the yield of crops and represents a more efficient use of water with reduced waste. Water for the sprinklers is most efficiently supplied from wells in the unconfined aquifer, but because these aquifers are not maintained by natural recharge, continuation of sprinkler irrigation is necessarily dependent upon artificial recharge. *See Powell* at pages 51-52. Just as they have in the past, the Rio Grande Canal shareholders have imported water into the Closed Basin from the Rio Grande and used it to recharge underground aquifers, in effect using these aquifers as a storage facility. The stored water is then extracted from the aquifers by means of wells which supply the sprinklers."

Finding, Judgment and Decree at pp. 6-7, Applicant's Exhibit 433.

126. The practice of subirrigation, once prevalent in the San Luis Valley, has greatly declined due to the introduction of center pivot sprinklers. However, the increased use of center pivot sprinklers has enhanced the need to maintain ground water levels. Thus, the water users in the Valley necessarily continue to divert their surface water rights in order to recharge the water so diverted in order to maintain the aquifer upon which they depend for their livelihood. Only by this method of conjunctive use of surface and ground water they are able to assure that there is sufficient water to supply their wells. Aquifer recharge is now the common practice throughout the San Luis Valley and is particularly prevalent in the Closed Basin area. Substantial quantities of water are diverted annually from the Rio Grande and carried north into the Closed Basin area by numerous

ditches and then used for either direct irrigation or aquifer recharge, or both.

127. These practices have been judicially recognized by this Court in Case No. W-3979, the Application for Change of Water Rights of the Rio Grande Canal Water Users Association, Applicant's Exhibit 433, and Case No. W-3980, the Application for Change of Water Rights of the San Luis Valley Irrigation District, Applicant's Exhibit 432. In addition, in Case No. 79CW91, Application for Water Rights of the Rio Grande Water Users Association, this Court decreed a water right for the direct diversion of water from the Rio Grande during the months of November and December, subject to availability under the Rio Grande Compact, to be used for recharge of aquifers underlying ditch systems located both north and south of the Rio Grande. The historic and current practice of subirrigation and aquifer recharge has been a principal factor in maintenance of water levels in the unconfined aquifer system throughout much of the San Luis Valley. It also assists in explaining why ground water levels can decline in times of reduced surface water availability.

128. From the earliest days of irrigation in the San Luis Valley, drainage ditches have been constructed to regulate ground water levels. Historically, drains were used in connection with subirrigation to regulate the level of the water table. At times of great inflow, they were and continue to be used to carry away excess waters. Many drains are the source of supply for decreed water rights. The drains are also commonly used as a means for recharging water into the aquifers of the San Luis Valley.

H. EXISTING AQUIFER CONDITIONS

129. Beginning in approximately 1950, the San Luis Valley entered a prolonged dry period. The streamflow for the Rio Grande near Del Norte dropped substantially below the long-term average for the preceding period of record and stayed well below that average until the early 1980's. Objectors' Exhibit RG 7. As a result of this reduced surface water supply, irrigators began to use wells as a supplemental source of supply. In the late 1960's or early 1970's the State Engineer placed a moratorium on the construction of new wells to withdraw water from the confined aquifer of the San Luis Valley. Accordingly, during the 1970's, coincident with the advent of center pivot sprinkler irrigation systems, there was an increased reliance on ground water from the unconfined aquifer for irrigation. The State Engineer continued to issue well permits for wells withdrawing water from the unconfined aquifer until February, 1981, at which time a moratorium was placed on the issuance of any new well permits for new appropriations from that aquifer because there remained no unappropriated water. *See* §37-90-137(2), C.R.S.

130. The decade of 1970's, like the two preceding decades, was a comparatively dry period for the San Luis Valley, with the driest year of record occurring in 1977. During that time period, coincident with the increased reliance on ground water for irrigation, there was an observed decline in the water table in the unconfined aquifer. This water level decline is reported in U.S.G.S. Hydrologic Atlas No. 683, by Thomas Crouch (the "Crouch Report"). Applicant's Exhibits 37, 38 and 39. The Crouch Report describes water level changes in the

unconfined aquifer in the San Luis Valley and in the Rio Grande drainage in northern New Mexico from December, 1969 through January, 1980.

131. Pursuant to §37-90-103(10.5), C.R.S., the determination of whether ground water is nontributary is to be based upon, *inter alia*, aquifer conditions existing at the time of permit application. To describe these aquifer conditions, the Applicant relies heavily upon the Crouch Report. It asserts that the ground water level declines reported there will continue in the future with only minor variations. Likewise, the Applicant has assumed that the streamflow conditions existing during the period 1970-1979 are representative of a long-term trend that will continue, with only minor variations, in the future.

132. The application in this case was not filed until 1986, the amended application was not filed until August of 1990. The Applicant argues that conditions at the time it filed its application and well permit applications were unusually wet and that the prior period should be used for purposes of determining whether the ground water it seeks is nontributary. *See* §37-90-102 (10.5), C.R.S. The period selected by the Applicant to represent "existing" aquifer conditions is 1970 to 1979.

133. Use of the 1970-1979 time period is central to the Applicant's assertion that the water it seeks to divert is nontributary ground water. The Applicant's claim that the ground water is nontributary is predicated largely upon the assumption that the rates of ground water level declines from 1970-1979 have continued and have caused

a permanent break in the hydraulic connection between the unconfined aquifer and many of the surface streams in the San Luis Valley. The principal streams where the Applicant asserts that existing pumping has broken the hydraulic connection between the surface flow and the underlying alluvial aquifer are much of the Rio Grande, La Jara Creek, Saguache Creek, and San Luis Creek. Applicant's Exhibit 214, Objectors' Exhibits JO 144 and RG 71. The Applicant asserts that once this hydraulic connection was broken, that stream losses reached their maximum rate and further declines in ground water levels will not cause increased stream losses. By assuming these conditions exist and will continue in the future, the Applicant then argues that although its ground water use will cause increased water level declines, those added declines will not cause an increase in stream depletions in an amount in excess of 1/10th of one percent of the amount of water proposed to be withdrawn annually.

134. The relationship of streamflow to the adjacent ground water is largely dependent upon (1) the ability of the streambed to transmit water to or from the surrounding water table, and (2) the gradient between the stream and the water table. The ability of a streambed to transmit water is known as "conductance." The rate of streambed conductance has a direct relationship to the impacts to streamflows that can be caused by pumping within the ground water system. The lower the conductance value for the streambed, the lower the leakage rate and, hence, depletions to streamflows that will be projected to occur as the result of ground water pumping. The higher the conductance value, the greater the impact any particular amount of pumping within the ground water system can

have on the surface flows of the stream. The calculations of streambed conductance or leakance do not consider the potential impacts of ground water pumping on the ground waters moving into the alluvial channel and ground water hydraulically connected thereto.

135. The values for streambed conductance or leakance testified to by various witnesses varied widely and were confusing because the evidence was reported in both gallons per day per foot squared and cubic feet per day. The variance among the witnesses ranged from Mr. Brogden's value of approximately 3 gal/day/ft^2 near Del Norte and 0.02 ft/day (0.15 gal/day/ft^2) at Alamosa to the values testified to by the Division Engineer and Mr. Davey in the range of 10 and 11 gal/day/ft^2, based upon gain/loss studies on the Rio Grande. The literature submitted into evidence by the Applicant and the testimony of the Objectors' witnesses established that stream conductance values in the range of 10 gal/day/ft^2 and greater are reasonable for the Rio Grande in the vicinity of Alamosa and that higher values are appropriate in the reach from Del Norte to Monte Vista.

136. Although there are not measured values for all reaches of the Rio Grande and other streams within the San Luis Valley, the Court finds that the values relied upon by Mr. Brogden and incorporated into the Applicant's computer model are not credible. The rate of leakance claimed by Mr. Brogden for the bed of the Rio Grande at Alamosa is comparable to the leakage rate for an engineered retaining pond lined with compacted clay. His leakance rates are absurdly low in comparison to the observed rates testified to by Mr. Davey and the Division Engineer derived from their field investigations.

137. On rebuttal, Mr. Brogden introduced a U.S.G.S. report, "An Evaluation of the Effect of Groundwater Pumpage on the Infiltration Rate of a Semipervious Streambed," by T.E. Moore and C.T. Jenkins, which detailed various river conductance values observed and measured by the U.S.G.S. in the Arkansas River Basin. Applicant's Exhibit 1046. The values contained in that report were similar to the values used by the Objectors in this case. The Court finds that the report provides an appropriate range to consider for riverbed conductance values in the Rio Grande. As testified to by the Objectors' witnesses, the Arkansas River would have, if anything, lower streambed conductance values than the Rio Grande, given the morphology of the Arkansas River. The Applicant's Exhibit 1046 therefore supports the conductance values testified to by the Objectors' witnesses.

138. The Applicant's witness, Mr. Prickett, did not conduct adequate investigations upon which to provide testimony concerning streambed leakance values. The Court finds Mr. Prickett's testimony on the relationship between the Rio Grande and the Arkansas River Basins to lack credibility and foundation and discounts his testimony.

139. The Applicant's analysis assumes that the impact on streamflows is the only relevant inquiry to determine whether the ground water it seeks is nontributary. Even if that was a proper interpretation of the law, the Court finds that the Applicant's assumptions about aquifer and streamflow conditions are unsupported by the evidence. For purposes of its analysis, the Applicant seeks to ignore the entire period of record to determine what constitutes normal or average streamflows in the

Rio Grande. Rather, the Applicant has looked at various portions of the period of record, principally from 1950 to the present. In each of its analyses, it attempts to show that the period of 1970-1979 represents some form of average or normal condition.

140. There are 100 years of recorded streamflows for the Rio Grande at Del Norte. Those streamflows are depicted in a bar chart on Objectors' Exhibit RG 7. That exhibit also displays the average streamflow at Del Norte for the period of record, the ten-year running average, the 1890-1949 average, and the 1950-1989 average. Use of any of these measures shows the period 1970-1979 to have been a period of low streamflow on the Rio Grande. The period from 1980 onward has been wetter than the 1970's. In 1985 the ten-year running average of streamflows came up to the long-term average and remained above the long-term average through 1989.

141. The Court finds that the Crouch Report, while documenting ground water level declines during a limited period of time, is not reflective of either existing or long-term aquifer conditions in the San Luis Valley. To the contrary, the uncontradicted evidence establishes that the ground water levels selected as the starting point in the Crouch Report were a near record high based on the available records. The evidence also established that by 1986, a substantial portion of the wells measured by Mr. Crouch recovered to or very near their 1969 water levels, eliminating the previously observed declines. Other wells with long-term records throughout the San Luis Valley showed a similar recovery during the mid-1980's. The more complete and reliable evidence presented to the

Court and the most reasonable interpretation of the evidence is that the ground water level declines documented in the Crouch Report were part of a larger cycle of ground water level changes reflective of changes in inflow and recharge and cannot be said to be representative of the long-term conditions to be expected in the unconfined aquifer.

142. Applicant relies on WRI 86-4113 as support for its assumptions that 1970 represents a state of equilibrium in the San Luis Valley. The Applicant also relies upon the report to support other assumptions regarding existing aquifer conditions. The report is part of the Southwest Alluvial Basin Study which is in turn part of the Regional Aquifer System Analysis conducted nationwide by that agency. Necessarily, the report is general in nature and it relies entirely upon existing data available on the public record.

143. The limitations inherent in WRI 86-4113 are identified by the authors. The authors state the computer model which is described in the report does not result in a unique combination of aquifer characteristics and boundary conditions. The authors also state that in order to improve the model's calibration, additional data would be required that has not been collected. They specifically identify the lack of data for calibration of their model in the north and east parts of the Valley. This lack of data was corroborated by Objectors' witness, Dr. Sharma. In addition, the authors state that the reliability of model results in predicting water level declines in the San Luis Valley was limited because of a lack of data in the non-irrigated areas.

144. The Court finds that the reliability of the model in WRI 86-4113 is further brought into question by the assumptions made by the authors which were not supported by the collection of new data. Based upon the information contained in WRI 86-4113, and the evidence presented during the trial, the Court finds that the Applicant has failed to sustain its claim that 1970 was representative of steady-state conditions in the hydrologic system of the San Luis Valley.

145. The Applicant supported its claim that the 1970-1979 period represented average streamflow conditions by reliance on precipitation station records. The Applicant presented evidence about the long-term average precipitation at the Wolf Creek gauging station in the upper Rio Grande and the Alamosa weather station on the Valley floor. Based on these two precipitation stations, the Applicant asserted that the streamflows in the 1970-1979 period were representative of long-term trends. The Division Engineer makes extensive use of precipitation stations throughout the San Luis Valley for purposes of administration of water rights and the Rio Grande Compact. The Division Engineer testified that the Wolf Creek station is one of the wettest precipitation stations in the San Luis Valley and it cannot be considered representative of precipitation throughout the headwaters of the Rio Grande. In addition, the Division Engineer testified that the Alamosa weather station is the station which historically receives the least precipitation of any of the precipitation stations on the Valley floor. Accordingly, the Court finds the evidence relied upon by the Applicant is not probative of basin-wide conditions or existing aquifer conditions.

146. Some portion of the ground water level decline in the unconfined aquifer during the 1970-1979 period is attributable to an increased reliance on ground water for irrigation. However, as the Division Engineer testified, there are a number of other factors at work in the decade of the 1970's which must be considered when evaluating the overall role of well usage in the ground water level declines. One such consideration is the effect that administration of the Rio Grande Compact had on the availability of surface water. As a result of a stipulation between the parties in *Texas v. Colorado*, 391 U.S. 901, 88 S.Ct. 1649, 20 L.Ed.2d 416 (1968), beginning in 1968 surface water rights were administered in Colorado to meet Colorado's delivery obligation under Article III of the Rio Grande Compact each and every year. *See Alamosa-La Jara Water Users Ass'n v. Gould*, 674 P.2d 914, 919 (1983). The effect of this stipulation was to require Colorado to administer surface water rights to insure an over-delivery, rather than risk violation of the stipulation and renewal of the litigation.

147. The Division Engineer explained that another effect of administration under the stipulation was to deprive water users in Colorado of the benefit of the credit and debit provisions in Article VI of the Compact. Those provisions were originally included in the Compact to allow under-deliveries in some years and credit for over-deliveries in others and thereby prevent the need to curtail pre-compact surface water rights in Colorado. As a result of the loss of this flexibility, the Division Engineer testified that during the period of 1968-1985, Colorado over-delivered some 300,000 acre-feet for which

it received no credit. But for operation under the stipulation, that water could have been available for beneficial use in Colorado, including diversion by ditches into the Closed Basin area.

148. The Division Engineer also testified that during the late 1970's and early 1980's, a number of efforts were made to reduce the amount of over-deliveries. These efforts included refinement of the administration of water rights to reduce curtailment and over-deliveries, the institution of out-of-priority storage in pre-compact reservoirs high in the Rio Grande watershed, and increased wintertime diversions of water for recharge purposes. Out-of-priority storage was permitted in upstream pre-compact reservoirs where the water was held for delivery under the Compact and, if not needed to meet Compact obligations, it reverted to water users on the Rio Grande. In addition, in years in which it appeared that the Compact obligation would be met, the Division Engineer permitted ditches on the Rio Grande to divert water during the months of November and December for aquifer recharge purposes. Each of the practices helped reduce over-deliveries and increase the amount of water available for use in Colorado.

149. In 1985, Elephant Butte Reservoir spilled, thus eliminating Colorado's debt under the Rio Grande Compact. This led to the dismissal of the stayed Supreme Court litigation in *Texas v. Colorado*, and restored Colorado's ability to use the debit and credit provisions of Article VI of the Compact. As explained by the Division Engineer, now in years when there is an over-delivery of water, credit is received and in years of under-delivery, a debit is accrued, all without the need to harshly curtail

water rights in Colorado. This flexibility increases the amount of water available for diversion to beneficial use in Colorado. In addition, in the late 1980's the Closed Basin Project began production. Water from the Closed Basin Project is made available to both the Rio Grande and Conejos River and is used to satisfy the Compact obligations of the respective streams. The Closed Basin Project is authorized to produce up to 600,000 acre-feet over any ten-year period for this purpose. The availability of this water has the effect of making greater amounts of water available for diversion from those rivers and thereby increasing the amount of water available for the Closed Basin area and recharge of the aquifer systems.

150. Based on the testimony of the State's computer modeling expert, Mr. Schroeder, which was unrebutted, the Court finds that the ground water system in the San Luis Valley is most sensitive to recharge. As the quantity of water available for recharge is reduced, the ground water table drops; as recharge is increased, the ground water table rises. As a result, the influence of the Rio Grande Compact and the availability of water for recharge is very significant in determining the appropriate conditions to model or in making decisions about the Valley's hydrology.

151. When all of these factors are taken together, it is apparent that the change in the unconfined aquifer's ground water levels documented in the Crouch Report is not a reliable basis for making projections about long-term trends in the water levels in the unconfined aquifer. Likewise, the period 1970-1979 is not reflective of the aquifer conditions existing in the San Luis Valley at the time that the application or amended application was

filed in this case. The Court finds that 1970-1979 is not the appropriate period for use to determine whether the ground water sought by the Applicant is nontributary.

I. EVAPOTRANSPIRATION

152. Reduction in evapotranspiration by eradication of phreatophytes is critical to the Applicant's theory and proof that the ground water it claims in [sic] nontributary. Only by finding very high rates of evapotranspiration can the Applicant reduce its stream depletions to a level that it contends would make the water it claims nontributary. All of the efforts to model the Valley's hydrologic system address the reduction in evapotranspiration by native vegetation resulting from lowering the ground water table. This "salvage" as it is sometimes called has a substantial impact on the results predicted by the computer models. If too much "salvage" is claimed, the calculated water level declines and stream depletions will be understated. Due to the important role evapotranspiration plays in the accuracy of any computer model's predictions, and since the Applicant and the Objectors rely upon computer model predictions, it is necessary for the Court to make findings regarding evapotranspiration by native vegetation.

153. The Applicant sought to quantify the reduction in evapotranspiration by plant life in the Valley that would be caused by the Applicant's withdrawal of 200,000 acre-feet of ground water per year. This reduction in evapotranspiration would be caused by the Applicant's ground water pumping lowering the water table below the root zones of plants that obtain all or a portion

of their water supply from the water table. According to Applicant's expert, Mr. Brogden, at the end of 100 years of pumping, 178,050 acre-feet or 89.02% of the total amount of water to be withdrawn annually by the Applicant would come from the reduction in evapotranspiration caused by the Applicant's eradication of phreatophytes. *See* Applicant's Exhibit 264.

154. Evapotranspiration can occur when the water table is sufficiently close to the surface of the ground to enable plants to derive all or a portion of their water supply from the aquifer. According to the evidence, the lowering of the water table will reduce the amount of water that plants can derive from the water table. When the water table has been lowered sufficiently, the plants will no longer be able to obtain the water from the water table and, in most instances, the plant life will die.

155. In the San Luis Valley there are areas where the water table is sufficiently close to the ground surface to enable plants to obtain all or a portion of their water supply from the water table. This can occur, for example, in areas where subirrigation is still practiced, and in the wetland areas, such as those found in the vicinity of the Applicant's Villa Grove property, the Russell Lakes area, the Mishak Lakes area, on the Baca Ranch and adjacent land, and the San Luis Lakes area. In addition, outside the wetland areas there are non-cropland areas where native vegetation consumes water from the water table. The areas in which the Applicant asserts that this evapotranspiration occurs is shown on Applicant's Exhibit 174. The majority of these lands are located north of the Rio Grande in the Closed Basin area.

156. The evidence contained in Applicant's Exhibit 65, establishes that in order to quantify the amount of evapotranspiration from the water table by plant life, it is necessary to know the particular plant species involved, the depth to water, the locations within the root zone from which a plant is capable of extracting water, and the depth below land surface from which a plant can no longer obtain water from the root zone. In addition, for any given plant species, Exhibit 65 states it is important to know the density, or the number of plants, per given area; the rooting depth of the plant; the water quality; and any other sources of water available to supply the water needs of the plant.

157. Another important factor in accurate quantification of evapotranspiration is the quantity of evapotranspiration that is eliminated for every unit decline in the water level. The Applicant assumes that this is a linear function from the starting water table elevation down to the extinction depth, *i.e.*, the depth below which the plant no longer obtains water from the water table. The Objectors dispute this assumption and assert instead that a curvelinear function more accurately reflects the phenomenon because the plants take more of their water supply from shallower depths. Curvelinear functions have been adopted by Mr. Phil Emery in his studies of evapotranspiration and have also been used by the State Engineer in his investigations of evapotranspiration. Based on the evidence presented, the Court finds that a curvelinear function is the more accurate method to simulate the actual distribution of the depths from which plants withdraw their water from the water table and,

hence, the amount of reduction in evapotranspiration per unit of water level decline.

158. The Applicant's analysis of evapotranspiration used three vegetation classifications. The first was cultivated croplands where the starting depth to water is 2 feet, the extinction depth is 6 feet, and the maximum evapotranspiration assigned is approximately 0.6 acre-feet per year. The second was so-called "free water surface areas" where the depth to water ranged between 0 to 2 feet below the land surface. The extinction depth for this classification was 2 feet and the maximum evapotranspiration is assumed to be 2.6 acre-feet per year. This classification covers many of the phreatophyte plant species found in wetlands. The Applicant's Exhibit 176 depicts 88 square miles or approximately 56,000 acres of these wetland areas in the Closed Basin. The final classification used by the Applicant is the so-called "native vegetation areas." The starting depth to water for this classification is 2 feet, the extinction depth is 10 feet, and the maximum evapotranspiration rate is approximately 1.8 acre-feet per year. This classification also includes many of the phreatophyte plant species.

159. The Applicant made no detailed field surveys of the location and distribution of the various vegetation classifications. Rather, it relied on farmland mapping by the Soil Conservation Service, general observations made while driving through the San Luis Valley (sometimes known as windshield surveys), and general comparison of its mapping to high altitude aerial photography. The Applicant made no effort to determine the various types of plants actually found within each of its classifications,

the density of the plant types within its various classifications, or whether all of the plants in fact obtained all or a portion of their water from the water table. The Applicant also made no investigation of the rates and depths from which the particular plant species in fact obtain water from the water table.

160. The uncontested testimony of the Objectors' expert, Dr. Cooper, established that in the greasewood and rabbit brush communities there are members of those plant communities which are not phreatophytes during all or a substantial portion of their life cycle. Accordingly, reduction in evapotranspiration cannot be claimed for the portions of those plant communities that do not obtain water from the water table.

161. The Applicant used its computer model to simulate the reduction in evapotranspiration. In the model's four square mile grid cells, the Applicant selected a maximum evapotranspiration rate based upon the starting depth to water in the cell and the vegetative classification assigned to the cell. The starting depth to water is extremely important for determination of evapotranspiration. If the starting water level is too high, more evapotranspiration will be calculated than actually occurs. The Applicant's determination of the starting depth to water is based on water level information reported in U.S.G.S. Hydrologic Atlas 381, based upon 1971 water levels, and the Crouch Report. Each of the reports contains a map of the entire San Luis Valley showing depth to water contours. The smallest contour interval, 6 feet is found in Hydrologic Atlas 381. The contour intervals in the Crouch Report are 10 feet, the same as the maximum extinction depth used by the Applicant. Using this information, the

Applicant prepared its own depth to water map, Applicant's Exhibit 173, with contour intervals of 2 feet. These contours were created by interpolation from the underlying data. Because of the multiple levels of approximation contained in the creation of Applicant's Exhibit 173, its accuracy and reliability is subject to substantial doubt.

162. The contoured water level data shown in Applicant's Exhibit 173 required yet another level of interpolation before information could be used in its computer model. The computer model requires one starting depth to water to be assigned to each grid cell. For many grid cells there was more than one water level contour on Applicant's Exhibit 173. When that occurred, Applicant's expert, Ms. McGowan, testified that the shallowest depth to water in the cell was selected in order to assign the maximum evapotranspiration rate. Once this had been done, no further adjustments were made to the beginning depth to water. *Id.* The Court finds that this methodology results in an over estimation of evapotranspiration in almost all circumstances.

163. Another approximation contained in the Applicant's determination of evapotranspiration was in its assignment of vegetative classifications to the cells of its model. Each model cell was assigned a single vegetative classification for the entire four square mile area. It is obvious that nature has not arranged vegetation in this manner. The Applicant has not done any careful study of how this approximation or any of the other approximations contained in its analysis affect the accuracy of its prediction.

164. The Applicant's computer model used a linear function to simulate reductions in evapotranspiration for each of the three vegetation classifications. Accordingly, the reduction in evapotranspiration is assumed to occur evenly for each unit of decline in ground water elevation. The Applicant defended this assumption on the basis that it was the function contained in the manual for the MODFLOW model it used. However, as acknowledged by the Applicant's experts and experts for the Objectors, modification of the model's function for evapotranspiration can be made and have been commonly made by other investigators in order to more accurately replicate the actual rate and depth distribution of evapotranspiration.

165. The Court finds that the method adopted by the Applicant to simulate evapotranspiration is not accurate or reliable. Based upon the evidence, it appears that the Applicant materially overstates the potential for reduction in evapotranspiration as a result of lowering ground water levels. This overstatement is a result of the manner in which the Applicant selected its starting depth to water, the assumptions inherent in its maximum evapotranspiration rates, including assumptions about high plant densities, plant cover, plant distribution and the use of a linear function to replicate evapotranspiration reductions. Had a curvelinear function been used for the various vegetation categories, the model would have calculated less potential reduction in evapotranspiration. In addition, the Applicant's selection of the extinction depth in its non-cropland areas is shallower than that reported by most other investigators. The effect of this shallower extinction depth is not to be "conservative" as stated by the Applicant's expert. Rather, the effect is to

increase the amount of evapotranspiration reduction that can occur for any unit decline in the water table. This is particularly significant for areas where the water level declines will be less than the full extinction depth of the plants. For those areas, a shallower extinction depth has the effect of permitting greater calculated reductions in evapotranspiration. The result of making these assumptions is that the Applicant's computer model calculates smaller water level declines than will actually occur.

166. The evidence submitted by the Applicant did not address the nature of the plant communities or the effect on the plant communities of the reduction in water levels to be caused by its proposed pumping. However, the uncontested evidence offered by the Objectors shows that outside the agricultural areas, the plant communities which obtain all or a portion of their water supply from the water table are phreatophytes. In the natural vegetation areas other than wetlands, the plant communities are principally greasewood and rabbit brush. Within the wetland areas, the plant communities include bulrushes, sedges, alkali cord grass, alkali bulrushes, spike rushes, rushes, salt grass and other aquatic and wetland vegetation.

167. The undisputed evidence establishes that in the northern and eastern portions of the Closed Basin area there are in excess of 50,000 acres of wetlands. These wetland areas exist near Villa Grove, on the Baca Ranch, in the area of Russell Lakes and Mishak Lakes, along San Luis Creek, in the area of Head and San Luis Lake and in numerous other areas depicted on Objectors' Exhibit State 26. In these wetland areas the vegetation is phreatophytes. The more technical classification for many of

these plants is hydrophytes, a subclassification of phreatophytes. Near Villa Grove, the wetland communities have one to two meters of peat soils with hydrophytes growing in them. The existence of this peat soil indicates a saturated soil condition which has existed for thousands of years. In other wetland areas in the San Luis Valley, peat soils are also present indicating that these are natural wetlands which have existed for many years.

168. The detailed investigations carried out by the Objectors' expert, Dr. Cooper, demonstrate that the source of water for these wetlands is both surface water and ground water from the unconfined aquifer, tributary to surface streams. By the use of over 190 observation wells, Dr. Cooper established that the wetland areas he studied derived their water from the water table and surface water and that the water table is in hydraulic connection with the surface streams. The surface streams found to be in hydraulic connection with the water table included Rock Creek, San Luis Creek, Russell Creek, Saguache Creek, LaGarita Creek, Werner Arroyo, Big Spring Creek, Little Spring Creek, and Sand Creek in the vicinities studied by Dr. Cooper. The Court finds this to be fact. Dr. Cooper's unrebutted testimony also establishes that these wetland areas are representative of wetlands throughout the San Luis Valley.

169. Each of the streams found by Dr. Cooper to be in hydraulic connection with the water table is also a stream that the Division Engineer has testified is overappropriated. If the water on these streams was not used by the wetland vegetation, then it would presumably be available to vested water rights in the order of their priority.

170. The Applicant's expert, Mr. Brogden, described the effect on the native vegetation from the lowering of the water table as a "shift in plant communities". He then admitted that this shift, in fact, meant that the vegetation would die. This testimony was confirmed by Dr. Cooper. It was Dr. Cooper's uncontested opinion that the water level declines predicted to occur from the Applicant's pumping would cause the total eradication of at least 26,000 acres of wetland phreatophytes in the Villa Grove, Baca, and San Luis Lakes areas. It was his opinion that at least an additional 24,000 acres of wetlands would be substantially injured. It was Dr. Cooper's uncontested testimony that the wetland areas, in which there is standing water and aquatic phreatophytes, are the most biologically diverse and the most important to water fowl. He further testified that it is these portions of the wetland phreatophyte communities that would be the first to be eradicated as a result of water level drawdowns. The wetland phreatophytes that would not be totally eradicated are the less biologically productive and less important species.

171. The Court finds from the evidence presented by both the Applicant and the Objectors that Applicant's proposed ground water withdrawal will result in the eradication of vast acreages of native phreatophytes, the elimination of at least 26,000 acres of wetlands, and substantial injury to at least an additional 24,000 acres of wetlands in the San Luis Valley.

172. The Court finds that by the Applicant's method of calculation, the Applicant has over-estimated the amount of potential evapotranspiration which can be eliminated by its projected lowering of the water table.

Since this assumed reduction in evapotranspiration is reflected as recharge to the model, the Applicant's projected water level declines are understated. According to the testimony of Objectors' expert, Dr. Sharma, the Applicant's model routes the recharge from reduced evapotranspiration down through the extensive faults and fracture zones simulated in its computer model. The recharge then comes up through faults under Applicant's property and is simulated as being withdrawn by the Applicant's wells. The Court finds that the effect of this modeling artifice is to greatly reduce the computed drawdowns from Applicant's proposed well pumping and thereby understates the actual amount of the drawdown, the actual impact on other underground water rights, and the actual stream depletions that would result.

J. COMPUTER GROUND WATER FLOW MODELS

173. Two ground water models of the San Luis Valley were submitted into evidence in this case, one by the Applicant and one by the Objector State Engineer. Both models were based on the McDonald-Harbaugh modular, three-dimensional finite-difference ground water flow model known as MODFLOW. Applicant's Exhibit 75. This computer model is an accepted and recognized ground water model that is capable of simulating multi-layered aquifer systems, stream-aquifer interaction, drains, evapotranspiration, and other pertinent features of the hydrologic system. The fact that this model is an accepted and recognized model does not mean that the results generated by any given application of the model are correct. Rather, whether the results of the Applicant's model or

the State's model are correct and reliable requires the Court to make findings on the manner in which the model has been set up and operated, the availability of accurate data and of the accuracy of the input and assumptions supplied by the user to the model.

174. In the San Luis Valley there is a substantial lack of data about aquifer characteristics and water levels, particularly in the deeper portions of the aquifer systems and on the edges of the Valley. This is confirmed at pages 104-106 of WRI 86-4113 where the authors identify a series of additional data that need to be independently collected and verified in order to construct a reliable model of the San Luis Valley. This was also confirmed by Dr. Sharma who testified that modeling efforts for the San Luis Valley cannot be fully reliable because of this lack of data and the uncertainty in other parameters such as evapotranspiration and recharge. This lack of data and the data uncertainties limit the reliability of the models predictions.

175. The State Engineer has used MODFLOW in the "head" mode. Simply stated, this means that the model attempts to predict changes in actual water level elevations relative to ground surface. As invoked by the State Engineer, the model is capable of predicting both increases and decreases in ground water levels as a result of changes in recharge to and discharge from the aquifer system.

176. The Applicant has chosen to use the MODFLOW model in the "change" or "impact" mode. Use of the model in this mode does not entail an effort to match predicted changes in ground water level to actual

observed changes. Rather, the model is adjusted to reflect "existing conditions." When new stresses, such as pumping, are imposed on the model, the change caused by the new stresses can be determined.

177. The Applicant's model contains six layers, starting at the ground surface and extending to a depth of approximately 18,000 feet beneath land surface in the Baca graben. *See* Objectors' Exhibits JO 139 and 140. The grid cells used in the model are two miles by two miles. *See* Objectors' Exhibit JO 131. In contrast, the State Engineer's model has four layers, a total depth of 3,100 feet and grid cells of 1/2 mile by 1/2 mile through the central part of the San Luis Valley and one mile by 1/2 mile in the remainder of the Valley.

178. The Applicant relied on existing information on aquifer characteristics for input to its model. The Applicant did not drill any test wells or other wells to obtain information about the deeper aquifers underlying its property. The Applicant's model incorporates Mr. Brogden's assumptions about the aquifer conditions and hydrologic conditions in the San Luis Valley, including stream conductance and the role of faults in the San Luis Valley. It also incorporates the Applicant's assumptions about the location and extent of evapotranspiration in the San Luis Valley. The model assumes that 1970 was a period of equilibrium in the San Luis Valley. The model assumes that inflows and recharge occurring in the 1970-1979 period do not change in the future and that the discharge from the aquifers at the rates which occurred in the 1970-1979 period does not change in the future. The Applicant's model also assumes that only a short reach of San Luis Creek and Saguache Creek were in hydraulic

connection with the unconfined aquifer at the beginning of 1970, and that the Rio Grande, Conejos River, and the Alamosa/La Jara River were in hydraulic connection with the unconfined aquifer in 1970. No other streams in the San Luis Valley are represented in the model. The model, as set up by the Applicant, is only capable of predicting declines in ground water levels and is incapable of ever predicting an increase in ground water levels.

179. Before a computer model can be used to make predictions, it must be both calibrated and verified. Calibration is the process of running the model, comparing its predictions to known data, and then making appropriate adjustments to the model input data in order to make its predictions more precisely match observed data. There are two general types of calibration. One is steady-state calibration, in which model predictions are adjusted to match observed data at a fixed point in time. Following steady-state calibration models can be subject to transient calibration, which involves running the model for a period of time for which known data is available and adjusting input data until the predicted results closely match the known data. The purpose of calibration is to test the soundness of the model framework, the assumptions and the data input into the model and to assess the model's predictive ability. The evidence established also that the better practice is to follow a transient calibration with a verification. Verification involves running the model for a different time period for which known data is available and comparing the model's predictions with the known data. This provides an independent check of the adequacy of the calibration and the model's predictive ability.

180. The change or impact model used by the Applicant cannot be calibrated in a steady-state. Rather, the only type of calibration available is a transient calibration. For purposes of calibrating its model, the Applicant's experts, *inter alia*, adjusted "net aquifer depletion" in the unconfined aquifer and the first 1,500 feet of the unconfined aquifer. Starting in 1970, the Applicant attempted to assign sufficient annual withdrawal from the aquifers to result in water level declines matching those reported by Mr. Crouch for 1979. No effort was made to compare the water level declines predicted between 1970 and 1979 with observed data. No effort was made to calibrate withdrawals from the confined aquifer by comparing observed artesian pressure declines with predicted declines. No effort was made to verify the model after its calibration.

181. Once the Applicant had completed calibration, it attempted to run the model for 100 years. This did not work because the level of aquifer depletion assumed by the model resulted in the model predicting the complete dewatering of numerous areas of the unconfined aquifer. When this occurs, the model fails to "converge" or complete the numeric calculations and the run cannot be completed. The model series in which this problem occurred has been referred to as the Applicant's 100 Series.

182. To correct this problem, the Applicant changed the first layer of its model, which originally corresponded to the unconfined aquifer, to a 500-foot thick layer encompassing both the unconfined aquifer and a portion of the confined aquifer. The principal effect of this change was

to ignore the hydrologic distinction between the unconfined and confined aquifers and permit all existing pumping simulated in the unconfined aquifer to take water from both the unconfined and confined aquifers. By this modeling artifice, the Applicant was able to construct a model that would run for a 100-year predictive period without model cells drying up. This was referred to as the Applicant's 500 Series.

183. The 500 Series was never separately calibrated. Instead, the Applicant relied upon the initial 10-year calibration of its 100 Series for its 500 Series. The Applicant then asserted that the 100 Series and the 500 Series were equally reliable and that the 500 Series made essentially the same predictions. This conclusion is refuted by the overwhelming weight of the evidence.

184. The Court finds that the opinions of the Applicant's experts, based upon its model, are not credible. The Applicant's model was not properly calibrated or verified and incorporated a substantial number of assumptions about the hydrologic system in the San Luis Valley that the evidence has shown to be incorrect. The Applicant's model is not able to predict increases in ground water levels and cannot accurately predict the actual water level declines or stream depletions that will be caused by the Applicant's proposed pumping. As aptly stated by the Applicant's modeling expert, Mr. Koch, the model was not intended to replicate reality, but simply to prove that the water the Applicant claimed was nontributary. The Applicant attempted to do this by adopting modeling artifices that resulted in an understatement of the drawdowns and stream depletions that would be caused by the Applicant's proposed pumping.

185. The modeling effort undertaken by the State Engineer's office was originally undertaken for administrative purposes and is far more extensive and thorough than that of the Applicant. There has been an effort to calibrate the State's model, in both the steady-state and transient modes. The State's model does not purport to be able to predict with exact precision the quantity and location of stream depletions to be caused by the Applicant's proposed pumping to all streams. Rather, the claim advanced by the State, with respect to its model, is that it is adequate to make a determination whether the ground water proposed to be withdrawn by the Applicant will deplete certain surface streams within the San Luis Valley at a rate greater than 1/10th of one percent of the amount withdrawn annually. The Court finds that the State Engineer's model is adequate for this purpose.

186. The evidence establishes that there are a substantial number of drains in the agricultural areas of the San Luis Valley, that there are vested water rights on these drains, that these drains impact regional ground water levels, and that the flows in drains have an impact on amount of evapotranspiration. Neither of the models presented in evidence attempted to simulate the hydrologic effect of drains. Similarly, the evidence establishes that there is very little data regarding the characteristics of the aquifers below 1,000 feet in the San Luis Valley. Finally, there is an absence of observation well data and information on water levels in the deeper portions of the confined aquifer throughout the Valley and in both the confined and unconfined aquifers at the edges of the Valley. The evidence has established that this lack of data cannot be cured through calibration and will therefore

always result in a model the solution of which is not unique. The lack of data limits the Court's ability to rely exclusively upon modeling results.

187. The Court finds that the State's model is more reliable than that of the Applicant. That model showed the Applicant's proposed ground water withdrawals would deplete the surface flows of the Rio Grande and San Luis Creek by 3.7 percent of the amount withdrawn annually or about 7,400 acre feet per year annually by the 100th year of pumping. This is substantially in excess of 200 acre feet per year or 1/10th of one percent of the 200,000 acre feet that Applicant seeks to withdraw annually.

K. CONCLUSIONS

188. To prevail on its claim the Applicant was obliged to prove by a preponderance of the evidence that the water it sought to withdraw would not deplete the flow of a natural stream in excess of 1/10th of one percent of the amount of water withdrawn annually. That amount is 200 acre feet. The Court finds that the Applicant's proposed pumping will deplete the flow of a natural stream, including natural streams as defined in §§37-82-101(2) and 37-92-102(1)(b), in an amount far in excess of 200 acre feet annually. The evidence establishes that the depletion to surface flows of the Rio Grande and San Luis Creek alone, even under the limitation inherent in computer modeling, will be approximately 7,400 acre feet. Depletions of approximately 3,600 acre feet per year will occur to Big Spring Creek alone, and this creek was not included in the models. In addition, there are many

other streams in the Closed Basin whose flow will be depleted by the Applicant's ground water withdrawals, the depletions to these streams not calculated by the computer models. The depletions to the surface flows of those streams will be in addition to the depletions already quantified. By looking at the flows of surface streams alone it is clear that the ground water the Applicant proposed to withdraw is tributary ground water.

189. The evidence also established that the Applicant's proposed ground water withdrawals would reduce the yield of the Closed Basin Project by at least 38,000 acre feet annually, and the true impact is likely to be much greater. This amount is well in excess of the 1/10th of one percent or 200 acre feet annual minimum depletion allowed if the Applicant is to establish that the water is nontributary. The Closed Basin Project's decreed tributary ground water is a vested water right that would be injured by the Applicant's proposed withdrawals.

190. The parties disagree as to the meaning of the terms "aquifer conditions existing at the time of the permit application" in §37-90-103(10.5) and disagree over what time period should be used in this case. The Applicant seeks to rely upon the 1970-1979 period for these purposes. The Objectors do not believe that this is the appropriate period of time. For the purposes of this case the Court need not resolve that issue because the Court is satisfied that the ground water sought by the Applicant is tributary even if the period 1970-1979, or any period thereafter is used. Under even the Applicant's 1970-1979 period, the evidence established that the ground water sought by the Applicant is tributary and would deplete the flows of a natural stream, even if limited to the

surface flows, in an amount in excess of 1/10th of one percent of amount withdrawn annually.

191. Based upon the testimony of witnesses and evidence adduced in this case, the Court specifically finds that the water sought to be pumped by the Applicant is tributary ground water. Based upon the testimony and evidence of Mr. Schroeder, the Court further finds that the water is tributary to the Rio Grande. Based upon the testimony and evidence of Messrs. Schroeder, Davey, Vandiver, Bellis, Boddie, and Harmon, the Court further finds the ground water sought by the Applicant is tributary to the streams entering the Closed Basin as described in paragraph 94 above, to Head and San Luis Lakes as described in paragraph 95 above, and the Closed Basin Project as described in paragraphs 101-107 above. The Applicant's pumping in the manner proposed would result in material injury to water rights taking their supply from all of these sources and to the water right of the Closed Basin Project. There well may be injury to other underground water rights but the Court makes no finding on that issue at this time.

192. The Court finds based upon all of the evidence, including the predictions made by the State's model, that the ground water which the Applicant seeks to withdraw is tributary ground water. The evidence presented at trial has not established this fact simply by a preponderance of the evidence; the Court finds that the ground water has been shown to be tributary beyond a reasonable doubt.

VI. CONCLUSIONS OF LAW

"The law is a sort of hocus-pocus science."

– Charles Macklin

1. The foregoing Findings of Fact are incorporated herein as if fully set forth.

2. The Application herein is one contemplated by law, and this Court has exclusive jurisdiction over the subject matter of the proceeding. §37-92-203(1).

3. The Application and the Amended Application herein were filed with the Water Clerk in accordance with the provisions of §37-92-302(1)(a), C.R.S.

4. Timely and adequate notices of the filing and of the contents of the Application and the Amended Application herein were given in the manner provided by law, and this Court has jurisdiction over all persons or entities affected hereby, whether they have appeared of not. §37-92-302, C.R.S.

5. The burden of proof in any civil action shall be by a preponderance of the evidence. §13-25-127. The burden of proof resting upon the Applicant to prove the elements of its case does not shift during the course of trial. §37-92-304, C.R.S.; *Exchange National Bank v. Sparkman*, 191 Colo. 534, 554 P.2d 1090 (1976).

6. "Preponderance of the evidence" means "evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it, a fact sought to be proven must be more probable than not, that is, evidence which as a whole shows that the fact sought to be proved is more probable than not . . . That which

best accords with reason and probability." Blacks Law Dictionary, 1064 (5th Ed. 1979); *Page v. Clark*, 197 Colo. 306, 318, 592 P.2d 792, 800 (1979).

7. Ground water in Colorado is presumed to be tributary unless proven otherwise by a preponderance of the evidence. *Safranek v. Limon*, 123 Colo. 330, 228 P.2d. 975 (1951); *DeHaas v. Benesch* 116 Colo. 344, 181 P.2d 453 (1947). The State Engineer has issued his Determinations of Facts pursuant to §37-92-302(2) which conclude that the ground water sought to be withdrawn by the Applicant is tributary and that existing water rights could be injured by the Applicant's proposed ground water withdrawals. This determination is presumptively correct. §37-92-305(6); *see Danielson v. Jones*, 698 P.2d. 240 (Colo. 1985).

8. Colorado law recognizes three categories of water: waters of the natural stream, designated ground water and nontributary waters. All waters of the natural stream are, pursuant to Sections 5 and 6 of Article XV of the Colorado Constitution, subject to appropriation. As to waters of any natural stream "priority of appropriation shall give the better right as between those using the water for the same purpose." Colorado Constitution, Article XV, Section 6.

9. Nontributary water is not subject to appropriation pursuant to the Constitution. Instead, the Colorado Legislature has full power to legislate concerning nontributary waters, and can subject them to appropriation or to other methods of allocation, administration, and

use. *State of Colorado v. Southwestern Colorado Water Conservancy District*, 671 P.2d 1294 (Colo. 1983) (hereinafter the *"Huston"* decision).

10. Since the Constitution governs allocation of all waters of the natural stream, only waters which fall outside that category and are not waters of the natural stream subject to appropriation can be subject to such legislative control. The Colorado Legislature has adopted legislation addressing the allocation and use of nontributary ground water and defining such ground water by reference to "waters of the natural stream." C.R.S. §37-90-103(10.5) defines nontributary ground water as follows:

> 'Nontributary groundwater' means that groundwater, located outside the boundaries of any designated groundwater basins in existence on January 1, 1985, the withdrawal of which will not, within 100 years, deplete the flow of a natural stream, including a natural stream as defined in Sections 37-82-101(2) and 37-92-102(1)(b) at an annual rate greater than 1/10th of 1% of the annual rate of withdrawal. The determination of whether groundwater is nontributary shall be based upon aquifer conditions existing at the time of permit application. . . .

This statute must be interpreted *in pari materia* with constitutional, statutory, and case law definitions of waters that are subject to constitutional appropriation.

11. The Colorado Legislature is presumed to be aware of the well developed statutory and case law defining what waters are subject to appropriation and therefore cannot constitute nontributary ground water. Acting

with such knowledge, *see Thompson v. People*, 181 Colo. 194, 200, 510 P.2d 311, 313 (1973), the Colorado Legislature adopted the definition of nontributary ground water which specifically refers to and adopts the constitutional term used to describe waters that are subject to appropriation: "natural stream."

12. To give proper effect to the intention of the Legislature, the term "natural stream" as used in C.R.S. §37-90-103(10.5) must be accorded the same meaning as in Sections 5 and 6 of the Article XV of the Colorado Constitution and statutory and case law defining waters subject to constitutional appropriation.

13. C.R.S. Section 37-92-102(1)(a) declares the

> policy of the State of Colorado that all water in or tributary to natural surface streams, not including nontributary groundwater as that term is defined in Section 37-90-103, originating in or flowing into this State have always been and are hereby declared to be the property of the public, dedicated to the use of the people of the State, subject to appropriation and use in accordance with Sections 5 and 6 of Article XV of the State Constitution and this Article.

A right to use water constitutes "a water right," defined as "a right to use in accordance with its priority a certain portion of the waters of the State by reason of appropriation of the same." C.R.S. §37-92-103(12). "Waters of the state" in turn encompasses "all surface and underground water in or tributary to all natural streams within the State of Colorado, except for waters

referred to in §37-90-103(6)."[5] Finally, "Underground Water"

> as applied in this article for the purpose of defining the waters of a natural stream, means that water in the unconsolidated alluvial aquifer of sand, gravel, and other sedimentary materials and all other waters hydraulically connected thereto which can influence the rate or direction of movement of the water in that alluvial aquifer or a natural stream.

C.R.S. §37-92-103(11). These definitions, together encompassing the definition of waters subject to appropriation pursuant to the Constitution – that is, waters of the natural stream – are consistent with Colorado case law that interprets the term "natural stream" to mean all sources of supply which make up a natural stream, including subsurface percolating water. *In re German Ditch*, 56 Colo. 253, 270, 139 P.2d 9 (1913). Colorado law has long recognized that a natural stream includes water "tributary" thereto in the broadest sense:

> [I]t is a matter of no moment whether water reaches a certain point by percolation through the soil, by a subterranean channel, or by obvious surface channel. If by any of those natural methods it reaches the point, and is there appropriated in accordance with law, the appropriator has a priority in it which cannot be divested by the wrongful diversion by another, nor can there be any substantial diminution.

McClelland v. Hurdle, 3 Colo. App. 430, 33 P. 280 (1893).

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[5] §37-90-103(6) refers to designated groundwater.

14. C.R.S. §37-82-101(2), specifically referred to in §37-90-103(10.5), further defines waters of the natural stream. It provides:

> A stream system which arises as a natural surface stream and, as a natural or man-induced phenomenon, terminates within the State of Colorado through naturally occurring /evaporation and transpiration of its waters, *together with its underflow and tributary waters*, is a natural surface stream subject to appropriation as provided in subsection (1) of this section [37-82-101(1)] [Emphasis added].

> Section 37-82-101(1) provides in pertinent parts, as follows:

> The water of every natural stream, as referred to in Sections 5 and 6 of Article XVI of the state constitution, includes all the water occurring within the State of Colorado *which is in or tributary to a natural surface stream* but does not include nontributary groundwater as that term is defined in Section 37-90-103. [Emphasis added].

15) Reading these provisions together, it is clear and the Court must conclude as a matter of law that the unconfined aquifer is water of a natural stream. The unconfined aquifer meets both the statutory definition of waters subject to appropriation in §37-82-101(2), and the more general definition of waters of the natural stream set forth above. It comprises an unconsolidated alluvial aquifer as well as a stream system which arises as a natural surface stream which terminates within the state, together with its associated underflow and tributary water. Each of the streams described in paragraph 94 in

Part V above are also natural streams under these controlling legal standards as are the Rio Grande, Conejos River, Alamosa River and LaJara Creek.

16. C.R.S. §37-90-137(4) provides that in the issuance of permits to withdraw nontributary ground water, the provisions of Section 37-90-137(1) and (2) apply. Section 37-90-137(2) specifies that upon receipt of a well permit application, the State Engineer

> Shall make a determination as to whether or not the exercise of the requested permit will materially injure the vested water rights of others. If the State Engineer finds that there is unappropriated water available for withdrawal by the proposed well and that the vested water rights of others will not be materially injured, and can be substantiated by hydrological and geological facts, he shall issue a permit to construct a well, but not otherwise . . . .

Both the Applicant and the Objectors acknowledge the applicability of this section and its requirement that vested water rights cannot be materially injured by the withdrawal of nontributary ground water.

17. Section 37-90-102(1) goes on to provide:

> Economic development of this resource shall allow for the reduction of hydrostatic pressure levels and aquifer levels *consistent with the protection of appropriative rights in the natural stream system.*

Reduction of hydrostatic pressure levels and aquifer water levels in accordance with allowable annual withdrawals by nontributary ground water rights does not constitute material injury to vested nontributary ground

water rights; *see* §37-90-137(4)(c), C.R.S., but the General Assembly recognized that reductions of hydrostatic pressure levels and aquifer water wells may not protect tributary ground water rights as required by the Constitution.

18. The nature and scope of reserved rights are federal questions. *Eagle County*, 421 U.S. at 526; *United States v. District Court for Water Division No. 5*, 421 U.S. at 529-30. *See United States v. Denver*, 656 P.2d at 9; *United States v. Bell*, 724 P.2d 631, 641 (Colo. 1986) (federal water rights exist independently of state law and procedures).

19. Congress has the exclusive power to legislate with respect to property belonging to the United States. U.S. Const. Art IV, §3, Cl. 2. *Cf. Kleppe v. New Mexico*, 426 U.S. 529 (1976) (state statute purporting to regulate burros on the public domain unconstitutional).

20. Only that water which is in excess of that amount this Court has determined to be necessary to fulfill the purposes of the respective federal reservations is available for subsequent appropriators. *United States v. Denver*, 656 P. 2d at 21, 22.

21. State courts have a "solemn obligation" to follow federal law where reserved rights are concerned, *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 571 (1983).

22. Where reserved rights are concerned, the application of Colorado's definition of what constitutes material injury to federal reserved water rights is not necessarily determinative of the availability of water, or whether a decree injurious to the interests of the United States may be entered. *See e.g., Cappaert, supra.*

23. The doctrine of "maximum utilization" frequently invoked by the Applicant has been tempered by the Colorado Supreme Court in *Alamosa-La Jara Water Users Ass'n v. Gould, supra.* There, when addressing the regulation and development of the water resources of the San Luis Valley the Court stated:

> We note that the policy of maximum utilization does not required a single-minded endeavor to squeeze every drop of water from the valley's aquifers. Section 37-92-501(2)(e) makes clear that the objective of "maximum use" administration is "optimum use." (footnote omitted). Optimum use can only be achieved with proper regard for all significant factors, including environmental and economic concerns.(Citations omitted).

Id, 674 P.2d at 935. Accordingly, maximizing use is not the controlling consideration in the Court's analysis of the evidence in this case.

24. Ground water is considered to be nontributary if its withdrawal will not, within one hundred years, deplete the flow of a natural stream, including a natural stream as defined in Sections 37-82-101(2) and 37-92-102(1)(b), at an annual rate greater than one-tenth of one percent of the annual rate of withdrawal. The determination of whether ground water is nontributary shall be based on aquifer conditions existing at the time of the permit application. §37-90-103(10.5), C.R.S.

25. The parties disagree as to the meaning of the terms "aquifer conditions existing at the time of the permit application." The Court need not resolve this issue because whether the Court uses the period 1970-1979 as suggested by the Applicant, or any period thereafter,

does not change the result. Under even the Applicant's 1970-1979 period, the evidence established that the ground water sought by the Applicant is tributary.

26. The Applicant argues that in determining whether the water it seeks to withdraw is nontributary, this Court may only look at impacts to "natural streams" as that term is defined in §37-87-102(1)(b). This proposition is incorrect for several reasons. First, §37-87-102 by its own terms defines "natural stream" only "as used in" Article 87. Second, such a construction is inconsistent with §37-90-103(10.5) which specifically includes (but is not limited to) natural streams as defined in §§37-82-101(2) and 37-92-102(1)(b). In defining natural streams, these provisions include not only the surface stream as physically defined by its channel, but also include as part of the stream the ground water and underflow tributary to those surface flows. Thus, impacts to ground water tributary to the surface streams are relevant to the inquiry of whether the ground water sought by the Applicant is nontributary.

27. Having found by more than a preponderance of the evidence that the unconfined aquifer is a natural stream and is hydraulically connected to and influences the rate and direction of flow of natural streams in the San Luis Valley, the Court concludes based on the evidence that the water in the unconfined aquifer is tributary to those streams and is therefore waters of the state and part of the "natural stream" as that term is used in §§37-90-103(10.5) and 37-82-101, C.R.S.

28. The Court concludes that the withdrawal of ground water sought by the Applicant will, within one

hundred years, deplete the flow of the natural streams within the San Luis Valley at a rate far greater than one-tenth of one percent of the annual rate of withdrawal. Therefore, as a matter of law the ground water which Applicant seeks a right to withdraw is tributary to the natural stream. This has been established in this matter beyond a reasonable doubt.

29. As set forth in the findings of fact, the preponderance of the evidence demonstrated that the Applicant's proposed ground water withdrawals would materially injure vested and decreed water rights on a number of streams in the San Luis Valley.

30. The Applicant has not shown that the requested withdrawals would not materially injure the vested water rights of others. Therefore, the Court concludes that as a matter of law the Applicant is not entitled entry of a decree for the relief it requested. *See* §37-90-137(2), C.R.S.

VII. JUDGMENT AND DECREE

31. The foregoing Findings of Fact and Conclusions of Law are incorporated herein.

32. The Application in this case is hereby DENIED AND DISMISSED.

33. The Court awards the Objectors their costs to be taxed as provided by law.

34. The Court reserves judgment with respect to the claims of Objectors against Applicant for their costs, expenses and attorneys fees as a term and condition of the Applicant's dismissal of its tributary claim on the eve

of trial. Applicant is entitled to a hearing on the reasonableness of the costs, expenses and fees claimed and that hearing will be the subject of a seperate order.

35. The Court directs the clerk to enter judgment as above provided.

DATED this 10th day of February, 1992.

BY THE COURT:

[ROBERT W. OGBURN]
ROBERT W. OGBURN
Water Judge
Water Division No. 3
State of Colorado

DISTRICT COURT, WATER DIVISION 3, COLORADO

CASE NO. 86CW46

ORDER FOR ENTRY OF JUDGMENT

CONCERNING THE APPLICATION FOR WATER RIGHTS OF:

AMERICAN WATER DEVELOPMENT, INC.,

IN ALAMOSA, CONEJOS, COSTILLA, HINSDALE, MINERAL, RIO GRANDE AND SAGUACHE COUNTIES.

"Delay and excessive expense now characterize a large percentage of all civil litigation . . . litigation costs have become intolerable, and they cast a lengthening shadow over the basic fairness of our legal system."

– Justice Lewis F. Powell, Jr.

THIS MATTER came before the Court on Objectors' Verified Bill of Costs Attributable to Dismissal of Claim of Tributary Ground Water Pursuant to Rule 41(a)(2), C.R.C.P.

Following the six-week trial of Applicant's nontributary groundwater claim, Objectors also filed their Verified Bill of Costs Pursuant to Rule 54(d), C.R.C.P.

Applicant objected to the payment of any fees and costs in connection with its Motion to Voluntarily Dismiss its Tributary Claim, although Applicant conceded that the Court could impose terms and conditions as part of the requested dismissal without prejudice under Rule 41(a)(2). By Order dated November 21, 1991, nunc pro

tunc October 10, 1991, the Court granted Applicant's Motion to Voluntarily Dismiss Part IV of the Amended Application conditioned upon Applicant paying Objectors all of their attorney fees, expert witness fees, costs, fees, and other expenses related to the tributary claim.

A hearing was held on April 21-23, 1992 to determine the reasonableness and necessity of those expenditures claimed pursuant to Rule 41(a)(2) and Rule 54(d).

The Court has reviewed the parties' pleadings, affidavits, and legal authorities as well as the evidence, exhibits, and statements of counsel and being fully advised, finds and concludes as follows:

RULE 41(a)(2) CLAIMS

Objectors' Rule 41(a)(2) claims are as follows:

1. Rio Grande Water Conservation District (RGWCD):

A.	Attorney Fees	$543,258.00
B.	Expenses	149,581.00
C.	Consultant Fees	548,602.00
D.	Post-Trial Fees	13,373.00
		$1,254,814.00

2. Rio Grande Water Users' Association (RGWUA):

A.	Attorney Fees	$279,814.00
B.	Expenses	36,478.64
C.	Consultant Fees	100,245.33
D.	Post-Trial Fees	12,738.00
		$429,275.97

3. San Luis Valley Water Conservancy District (SLVWCD):

A.	Attorney Fees/Costs	**$1,991.61**

4. United States of America (USA):

A.	Attorney Fees	$145,010.00
B.	Paralegal Fees	11,269.62
C.	Expenses	9,188.89
D.	Consultant Fees	190,166.68
		$355,635.19

5. State of Colorado (COLO):

A.	Attorney Fees	$207,926.00
B.	Paralegal Fees	24,926.00
C.	Expenses	7,694.72
D.	DOW Consultant Fees and Office Employees	172,691.34
E.	SEO Office Employees	67,988.68
F.	Post-Trial Fees	3,873.75
		$485,100.49

6. Conejos Water Conservancy District (CWCD):

A.	Attorney Fees	$51,982.00
B.	Post-Trial Fees	6,928.75
		$58,911.25

7. Oasis Land & Cattle Co. (Oasis):

A.	Attorney Fees	$1,652.50
B.	Post-Trial Fees	1,086.85
		$2,738.75

8.	First Interstate Bank:	
	A. Attorney Fees	**$7,667.90**
9.	Howard Platz:	
	A. Attorney Fees	$1,189.50
	B. Expenses	442.00
		$1,631.50
10.	Marold Ranches, etc., (McMillen clients):	
	A. Attorney Fees	**$2,332.61**
11.	Cotton Creek Ranch:	
	A. Attorney Fees	**$543.00**
12.	Dennis Felmlee:	
	A. Expenses	**$1,281.25**
13.	Timothy Lovato:	
	A. Attorney Fees	**$1,669.48**
14.	Gayle Nichols:	
	A. Filing Fee	**$20.00**
TOTAL AMOUNT CLAIMED PURSUANT TO 41(a)(2):		**$2,603,612.50**

Applicant contends that the expenditures to a great extent were unnecessary and therefore unreasonable. Applicant called Clyde O. Martz, a water lawyer, who testified that water procedures as provided for in the Water Right Determination and Administration Act of 1969, and amendments thereto, simply never contemplated the time consuming and extended litigation that occurred in this case and that the Objectors should have, basically, raised issues to be considered by the water

judge who should have routinely granted this (and any other application) and then periodically reviewed the conditional decree to assure that there was no material injury to other water users. In his opinion, the aggregate costs of opposing the application should not have exceeded $200,000.00.

The Applicant then called Kenneth Burk, another water lawyer, who indicated that he disagreed with much of Mr. Martz' approach. Instead, he chose to analyze what he perceived to be the failure of the Objectors to mitigate their expenditures by failing to timely file a Motion for Partial Summary Judgment on the Applicant's tributary claim.

It was his position, contrary to the position of Allison Maynard, former deputy Attorney General, who represented the State of Colorado on this case for a period of time, and who voluntarily filed an affidavit with this Court, that such a motion could not have been filed with this Court with a probable degree of success in 1989 as suggested by Ms. Maynard's affidavit, which was marked as an exhibit but never offered into evidence.

Mr. Burk contends that the issue first became germane only after the Applicant's amendment of its application and after answers to interrogatories had been served on November 15, 1990. He conservatively suggested that the Objectors were in a position to fully appreciate this fact – that the tributary claim was without merit – by February 15, 1991, and that they should have filed a Motion for Partial Summary Judgment on that issue within a reasonable period of time after February 15, 1991.

Objectors did not file such a motion at any time. They did file a Motion for Partial Summary Judgment concerning the nontributary claim on September 4, 1991, which was denied. Mr. Burk agreed that there were material issues of fact on the nontributary claim and that the Court properly denied that motion. He contends that there were no material issues of fact concerning the tributary claim from at least after February 15, 1991. The Objectors, through David Robbins, William Paddock, and John Hill, contend that they could not "prove" that Applicant intended to export water under the tributary claim until the amended application was filed in August 1990 even though they were suspicious of Applicant's intent almost from the very outset of the case.

They also contend that the amended application continued to claim substantial tributary water for use within the San Luis Valley, and that fact alone would have defeated a Motion for Partial Summary Judgment. That was the position argued by Mr. Ross, Applicant's counsel at the hearing on the Motion to Voluntarily Dismiss the Tributary Claim in October 1991. He also contended Applicant could "prove" beneficial use of the water claimed until the conclusion of its case on the merits.

Because summary judgment is a drastic remedy, it may never be granted where there is a genuine issue as to a material fact. ***Abrahamsen v. Mountain States Telephone & Telegraph***, 177 Colo. 422, 494 P.2d 1287 (1972). All doubts as to the existence of an issue as to material fact must be resolved against the movant. ***Primock v. Hamilton***, 168 Colo. 524, 452 P.2d 375 (1969).

While Mr. Burk was of the opinion that there was a high probability that a partial summary judgment motion, if filed, would have been granted, the Court concludes that there would have been genuine material fact at issue that would have required the Court to deny a motion for partial summary judgment on the tributary claim, if filed, just as it denied a motion for partial summary judgment on the nontributary claim.

It is evident from the testimony at the April 1992 hearing that the Objectors were very careful to minimize expenses and eliminate duplication of effort. The degree of coordination of effort by counsel for the various Objectors is to be commended. While the fees and expenses may seem high to some, they could have been substantially higher except for the remarkable coordination to avoid overlapping efforts of counsel and experts alike.

Much of the early expenses incurred by Objectors was the direct result of the Applicant's failure to timely and fully comply with discovery requests of the Objectors between January 1988 and May 1990. Similarly, the Applicant propounded an enormous amount of discovery to the Objectors resulting in a tremendous amount of attorney and expert witness time in order to properly respond to the request for information of the Applicant and the transfer of 20,000 documents from RGWCD alone. Eventually, Objectors received 40,000-50,000 documents from the Applicant.

Depending on when a new tributary claim may be filed, much of the material discovered by Objectors prior to September 1991 will be outdated, if not useless, in any

hearing concerning a "new" tributary claim. Any benefit from this earlier discovery is speculative at best.

Accordingly, the Court concludes that the expenditures incurred by the Objectors in defending against the tributary claim of the Applicant, which they believed to be the strongest of all claims advanced by Applicant, were both necessary and reasonable expenses except as hereinafter noted.

There is a paucity of state law interpreting Rule 41(a)(2), C.R.C.P. ***Tillery v. District Court***, 692 P.2d 1079 (Colo. 1984) simply states that a trial court may impose terms and conditions upon the voluntary dismissal of a claim by imposing an award of costs and fees. The ***Tillery*** case does not really address what costs and fees are appropriate. Therefore, this Court has looked to the wealth of federal case law interpreting "costs and fees" under the identical Rule 41(a)(2). See ***Powers v. Professional Rodeo Cowboys Association***, 16 Brief Times Reporter 758 (Colo. App. 1992).

Under Federal case authority, the purpose of awarding costs under Rule 41(a)(2) is to fully compensate the defendant for reasonable expenses incurred before dismissal and to deter vexatious litigation. ***Bishop v. West American Insurance Co.***, 95 F.R.D. 494 (1982).

The award of costs usually includes all litigation-related expenses incurred by the defendant, including reasonable attorney fees. ***American Cyanamid Co. v. McGhee***, 317 F.2d 295 (5th Cir. 1963); ***Green Grant Co. v. M/V Fortune Star***, 92 F.R.D. 746 (1981). ***Mann v. Edwards***, 37 F.R.D. 452 (1965) held that costs payable under Rule 41(a)(2) are not limited to taxable costs under Rule 54(d),

but may include compensation for all litigation-related expenses incurred by the defendant. A Court should weigh the equities and make a decision which seems fair under all the circumstances. ***American Cyanamid Co.***, supra.

RULE 41(a)(2) CLAIMS DISALLOWED

The Court has earlier by oral order disallowed court reporter fees. Colorado still claims reimbursement of $9,000.00 for court reporter fees. This sum is disallowed.

Some claims are unsubstantiated or unverified and must be disallowed, i.e., McMillen clients, Cotton Creek Ranch, Dennis Felmlee and Timothy Lovato.

A number of claimants seek additional compensation for preparing for this hearing, namely, RGWCD, RGWUA, COLO, CWCD, Oasis, First Interstate Bank and Howard Platz. These post-trial fees must be disallowed. Attorney fee claimants are not entitled to compensation for time spent preparing the fee application. ***Department of Highways v. Anvil Point Prop.***, 722 P.2d 1024 (Colo. App. 1986). Attorney fees incurred in a hearing on attorneys' fees cannot be recovered absent a determination that the defense lacked substantial justification. ***Little v. Fellman***, 21 Colo. Lawyer 342 (Colo. App. 1991). No such showing was made in this case to justify the award of additional attorney fees.

Further, Colorado has included in its claim the sum of $173,818.52 for compensation for nonlegal employees of the Division of Wildlife (DOW) and the State and

Division Engineer's Office (SEO). These are not litigation-related expenses and must be disallowed.

Certain room and board expenses properly attributable to the trial of the nontributary claim must also be disallowed under Rule 41(a)(2) as well as a claim for a $1300.00 bat detector[1].

The attorney fees and expenses claimed are well documented but out of an abundance of caution and so as to preclude any concerns about vagueness, overlap, possible redundancy or questionable expense, the Court discounts the attorney fee and expense claims under Rule 41(a)(2) by a factor of 10 percent. ***Kennecutt Corp. v. EPA***, 804 F.2d 763 (D.C. Cir. 1983).

RULE 41(a)(2) CLAIMS ALLOWED

The amounts allowed each Objector are as follows:

1. RGWCD:

A.	Attorney Fees	$488,932.20
B.	Expenses	134,622.90
C.	Consultant Fees	548,602.00
D.	Post-Trial Fee	.00
		$1,172,157.10

2. RGWUA:

A.	Attorney Fees	$251,832.60
B.	Expenses	32,830.77

[1] I know the State of Colorado has budget problems, but we can't attempt to "balance the budget" on the backs of litigants.

C.	Consultant Fees	100,245.33
D.	Post-trial Expenses	.00
		$384,908.70

3. SLVWCD:

A.	Attorney Fees	**$1,792.45**

4. USA:

A.	Attorney Fees	$130,509.00
B.	Paralegal Fees	10,142.66
C.	Expenses	8,270.00
D.	Consultant Fees	190,166.68
		$339,088.34

5. COLO:

A.	Attorney Fees	$187,133.40
B.	Paralegal Fees	22,433.40
C.	Expenses	5,755.25
D.	DOW Consultant Fees and Office Employees	66,861.50
E.	SEO Office Employees	.00
F.	Post-Trial Fees	.00
		$282,183.55

6. CWCD:

A.	Attorney Fees	$46,783.80
B.	Post-Trial Fees	.00
		$46,783.80

7. Oasis:		
	A. Attorney Fees	$1,487.25
	B. Post-Trial Fees	.00
		$1,487.25
8. First Interstate Bank:		
	A. Attorney Fees	**$6,901.11**
9. Howard Platz:		
	A. Attorney Fees	$1,070.55
	B. Expenses	397.80
		$1,468.35
14. Gayle Nichols:		
	A. Filing Fee	**$20.00**
TOTAL AMOUNT ALLOWED PURSUANT TO 41(a)(2):		**$2,236,790.40**

RULE 54(d) CLAIMS

The Objectors were instructed by the Court to prepare a Bill of Costs in accordance with Rule 54(d), C.R.C.P. They did so. Objection was raised as to numerous charges.

Bill of costs filed pursuant to Rule 54(d) are as follows:

1. RGWCD:		
	A. Expert Witness Fees (5)	**$257,227.00**

2. RGWUA:

A.	Docket Fee	$20.00
B.	Expenses (photocopying)	5,000.00
C.	Expenses (Misc.)	1,500.00
		$6,520.00

3. USA:

A.	Docket Fee	$20.00
B.	Expert Witness Fees (4)	126,640.13
C.	Expenses	16,873.52
		$143,533.37

4. COLO:

A.	Expert Witness Fees (3)	**$65,810.94**

TOTAL AMOUNT CLAIMED
PURSUANT TO RULE 54(d): **$473,091.31**

After considering the requirements of §13-33-102(4), C.R.S., and §13-16-112, C.R.S., the Court is persuaded that expert witness fees were necessary and reasonable and, specifically, that more than four expert witnesses were really necessary as follows:

Dr. Devraj Sharma	$145,602.00	RGWCD
Dr. David Cooper	8,165.00	RGWCD
Dr. Emlen Hall	10,191.00	RGWCD
Mr. Philip Emery	26,031.00	RGWCD
Mr. Allen Davey	67,264.00	RGWCD
Mr. William Bellis	48,164.14	USA
HRS Water (Messrs. Bodie & Harmon)	63,975.99	USA
Dr. Devraj Sharma	14,550.00	USA

Mr. Don Schrupp	1,295.95	COLO
HRS Water (Messrs. Bodie & Harmon)	65,514.99	COLO

The Court finds all other costs claimed are authorized by statute and are reasonable. All costs claimed under Rule 54(d) are allowed.

Accordingly, judgment will enter pursuant to the findings and conclusions of the Court with respect to the matters set forth above.

DATED this 29th day of May, 1992.

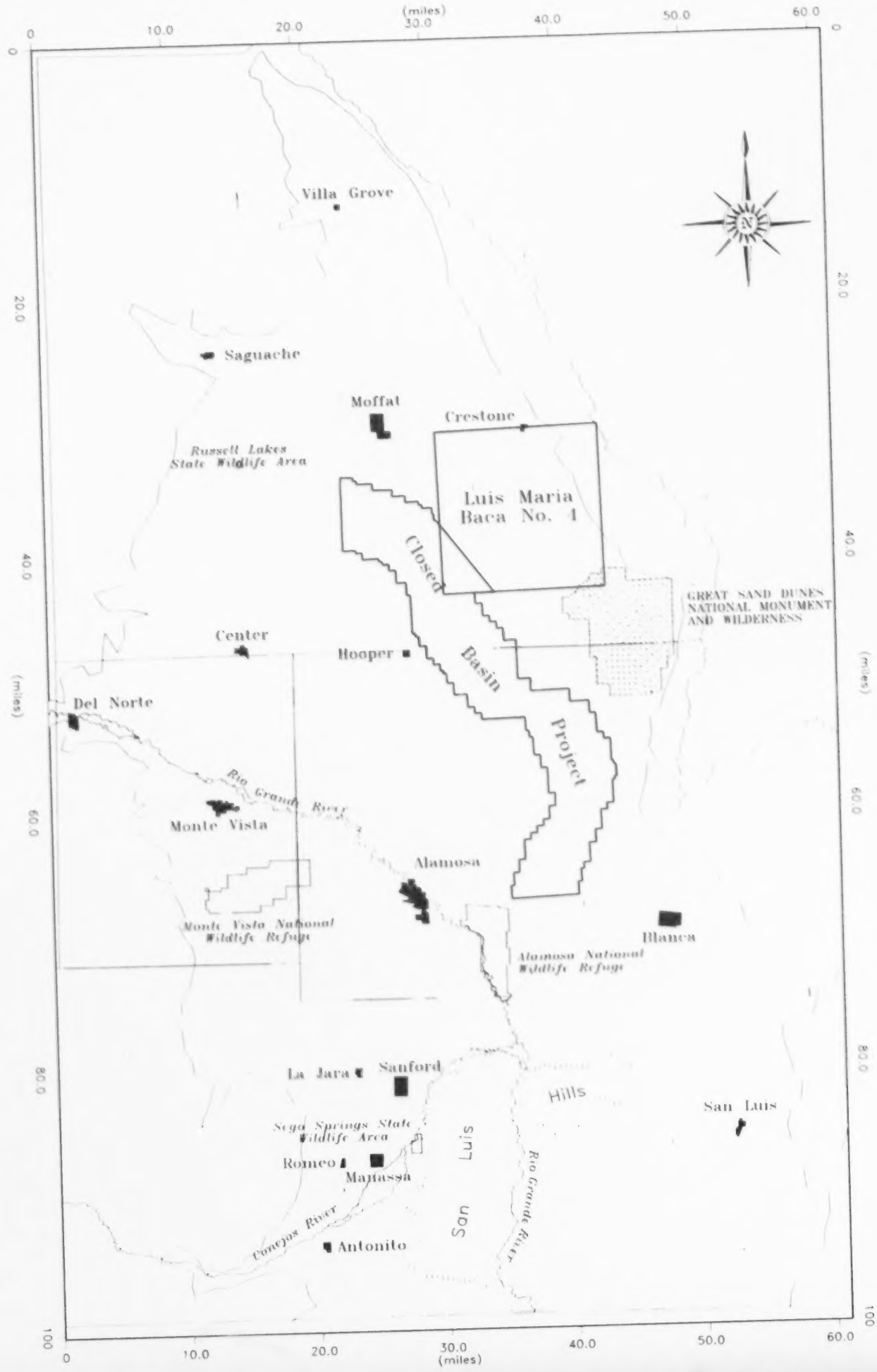
BY THE COURT:

[ROBERT W. OGBURN]

ROBERT W. OGBURN
Water Judge
Water Division 3
State of Colorado

Closed Basin Project & Baca Grant No. 4

San Luis Valley, Colorado



No. 94-390

NOV 2 1994
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1994

AMERICAN WATER DEVELOPMENT, INC., PETITIONER

v.

CITY OF ALAMOSA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF COLORADO

BRIEF FOR THE UNITED STATES IN OPPOSITION

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18 pp

QUESTIONS PRESENTED

1. Whether petitioner holds absolute ownership to the groundwater beneath the Baca Grant No. 4, so as to render petitioner's use of that groundwater beyond the reach of the State's legal regime concerning rights to the use of water.

2. Whether this Court should consider petitioner's contention that the Colorado courts violated the Due Process Clause of the United States Constitution by assessing certain litigation fees and costs against petitioner, when petitioner failed timely to raise that contention in its appeal to the Colorado Supreme Court.

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In the Supreme Court of the United States

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AMERICAN WATER DEVELOPMENT, INC., PETITIONER

v.

CITY OF ALAMOSA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF COLORADO

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Colorado Supreme Court (Pet. App. A1-A93) is reported at 874 P.2d 352. The opinions and orders of the district court (Pet. App. A94-A100, A110-A114, A127-A128)[1] are unreported.

JURISDICTION

The judgment of the Colorado Supreme Court was entered on May 9, 1994. A timely petition for rehearing was denied on June 6, 1994. Pet. App. A131-A132. The petition for a writ of certiorari was filed on September 1, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(a).

[1] The district court also issued various opinions and orders that are not reproduced in the appendix to the certiorari petition.

STATEMENT

This litigation commenced when petitioner filed an application in the Colorado state district court seeking a determination concerning rights to groundwater beneath certain lands in Colorado to which petitioner claimed ownership. Petitioner's application alleged four alternative claims, each based on a different legal theory. Petitioner later moved to dismiss one of its claims without prejudice. The trial court granted that motion, but did so on the condition that petitioner pay the opponents' costs and fees attributable to the claim. Petitioners' other claims were rejected on the merits by the trial court. The Colorado Supreme Court affirmed all of the trial court's rulings.

1. Petitioner and others initiated this litigation in the Colorado state courts in 1986 by filing an application (Pet. App. A133-A155) seeking to establish the right to withdraw 200,000 acre-feet of groundwater annually from wells to be located on certain lands situated in the San Luis Valley in south-central Colorado. The subject lands totalled more than 100,000 acres in two parcels. The smaller parcel, consisting of approximately 4,683 acres, is located near Villa Grove, Colorado. The larger parcel consists of the Baca Grant No. 4 and adjacent lands, situated to the south of Villa Grove. *Id.* at A7-A8.

In its original application, petitioner[2] asserted four alternative claims: (1) a claim for determination of a right to nontributary groundwater pursuant to Colo. Rev. Stat. § 37-90-137(4) (1990) (the "nontributary

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[2] Although several co-applicants were named in the original application, petitioner subsequently filed an amended application in which it was listed as the sole applicant. Pet. App. A7 n.2. The amended application also differed from the original one in certain particulars not at issue here. See *Id.* at A9.

claim"); (2) a claim based upon Spanish and Mexican law, as confirmed pursuant to the Treaty of Peace, Friendship, Limits, and Settlement with the Republic of Mexico (Treaty of Guadalupe Hildalgo), Feb. 2, 1848, 9 Stat. 922, to the groundwater underlying the Baca Grant No. 4 (the "Hispanic land grant claim"); (3) a claim based on the Act of June 21, 1860, ch. 167, 12 Stat. 71, to the groundwater underlying the Baca Grant No. 4 (the "federal land grant claim");[3] and a claim pursuant to Colo. Rev. Stat. §§ 37-92-101 *et seq.* (1990) for a determination of a water right for tributary groundwater (the "tributary claim"). Pet. App. A8-A9, A133-A155. Various entities, including the United States, filed objections to the application pursuant to Colo. Rev. Stat. § 37-92-302(1)(b) (1990). See Pet. App. A7 n.3.

2. The objectors moved for partial summary judgment on the land grant claims. On July 5, 1990, the district court entered partial summary judgment dismissing those claims. Pet. App. A94-A100. By this ruling, the court rejected petitioner's position that its ownership of the Baca Grant No. 4 encompasses absolute entitlements to groundwater that "exist entirely independent of Colorado's constitutional and statutory system for allocating its water resources." *Id.* at A95.

3. The district court then set petitioner's remaining claims for a trial scheduled to begin on October 15, 1991. On September 26, 1991, the court held a pretrial conference. Near the conclusion of that conference, petitioner submitted a motion (Pet. App. A356-A357) for the voluntary dismissal, without prejudice, of its tributary claim. Subsequently, after briefing and oral argument, the court granted the motion, but did so

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[3] The second and third claims are collectively referred to as the "land grant claims."

"subject to the condition that [petitioner] pay to Objectors all of their attorneys' fees, expert witness fees and costs, and other fees and expenses related to the Tributary Claim." *Id.* at A113. The court also stated that, immediately following the trial on the nontributary claim, it would hold an evidentiary hearing concerning the amounts to be so awarded. *Id.* at A114.

4. The case then proceeded to trial on the nontributary claim, which by then was the sole remaining claim. After the trial, the court ruled against petitioner on that claim and entered a judgment and decree denying and dismissing petitioner's application.

Thereafter, the court held an evidentiary hearing to determine the amounts of costs and fees (including costs related to the nontributary claim) to be awarded for all phases of the litigation. Ultimately, the court entered a judgment for the objectors totaling $2,236,790.40 for attorneys fees, expenses (including expert witness fees), and costs incurred in defending against the tributary claim, as well as $473,091.31 for other costs incident to the litigation resulting in dismissal of the nontributary claim. Pet. App. A58. Petitioner appealed both judgments to the Colorado Supreme Court, which consolidated the appeals.

5. The Colorado Supreme Court affirmed on all issues. Pet. App. A1-A93. As to petitioner's land grant claims, the court, after describing the history of the Baca Grant No. 4 (*id.* at A14-A21), concluded that "title to the Baca Grant No. 4 did not derive from the Mexican government or its Spanish predecessor." *Id.* at A25. Rather, the court held that the grant was solely federal in character. The court further found that the federal grant did not carry with it any incidents of Hispanic law or any other attribute that would defeat the application

of Colorado's legal system of water rights. *Id.* at A25-A29.

The court also upheld the trial court's action of conditioning the voluntary dismissal of petitioner's tributary claim, without prejudice, on the obligation that it pay the objectors' costs and attorneys fees attributable to that claim. The Colorado Supreme Court found that Colorado procedures authorize the Colorado courts to award fees and expenses as a condition of voluntary dismissal of a claim (Pet. App. A64-A68) and that this power is not affected by the Colorado rules specially applicable in water adjudication proceedings (*id.* at A68-A69). The Colorado Supreme Court further found that the trial court had applied the correct standards when it granted the motion for voluntary dismissal (*id.* at A70-A73) and that the amounts awarded were supported by the record (*id.* at A73-A86).

ARGUMENT

Petitioner contends that the Colorado Supreme Court erred by finding that the groundwater underlying the Baca Grant No. 4 is subject to Colorado's water rights laws. Petitioner also maintains that the Colorado courts violated the Due Process Clause of the United States Constitution by requiring the payment of the objectors' allocable fees and costs as the condition for granting petitioner's motion for the voluntary dismissal, without prejudice, of its tributary claim. Petitioner's contentions are without merit and present no issue warranting this Court's review.

1. Parts II and III of petitioner's water rights application sought confirmation of absolute and undiminished ownership rights to all groundwaters beneath the Baca Grant No. 4, based upon "Spanish and Mexican Law as recognized and affirmed by the United States" (Pet. App.

A143), and, alternatively, upon the theory that the United States' conveyance of the subject tract to petitioner's predecessor-in-interest carried with it absolute water rights. *Id.* at A148-A150. The essential facts are as follows.[4]

Acting upon a petition filed in 1821, the Mexican government conferred an undetermined amount of land in present-day New Mexico upon Luis Maria Cabeza de Baca and seventeen of his male children. Pet. App. A161-A168. Subsequently, in 1835, after Baca had left the tract, Juan de Dios Maese and others petitioned the Mexican government to grant them the same lands, commonly referred to as the "Vegas Grandes," previously granted to Baca. Don Maese and the others were granted title to, and put in possession of, the Vegas Grandes, with the provision that persons who owned no lands were also to be allowed to settle on the tract. Thus, many families settled on the Vegas Grandes, which became the town of Las Vegas. *Id.* at A159.

By the Treaty of Guadalupe Hidalgo, Feb. 2, 1848, 9 Stat. 922 (Pet. App. A195-A219), executed in 1848, sovereignty over lands north of the Rio Grande, including the Vegas Grandes, transferred to the United States. Article VIII of the Treaty provided that after cession the United States would respect the property held by Mexican citizens in the ceded territory. 9 Stat. 929-930 (Pet. App. A203-A204). To effectuate that provision, Congress, by the Act of July 22, 1854, ch. 103, 10 Stat. 308 (Pet. App. A220-A226), created the office of Surveyor General of the Territory of New Mexico and, in Section 8 of the Act, 10 Stat. 309 (Pet. App. A223-A224), charged that officer with the duties of examining into all

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[4] These facts are also set out in *Shaw* v. *Kellogg*, 170 U.S. 312 (1898), which concerned the Baca Grant No. 4.

land claims within the Territory and reporting to Congress.

The Surveyor General's report was transmitted to Congress in 1860. H.R. Exec. Doc. No. 14, 36th Cong., 1st Sess. (1860) (Pet. App. A156-A194). With respect to the Vegas Grandes tract, the Surveyor General, after detailing the facts and circumstances of the two conflicting grants, concluded (*id.* at A193-A194):

> It is firmly believed that the land embraced in either of the two grants is lawfully separated from the public domain and entirely beyond the disposal of the general government, and that in the absence of the one the other would be a good and valid grant; but as this office has no power to decide between conflicting parties, they are referred to the proper tribunals of the country for the adjudication of their respective claims, and the case is hereby respectfully referred to Congress through the proper channel for its action in the premises.

The anticipated adjudication to resolve the conflicting claims, however, never materialized. The Senate Committee on Private Land Claims, in recommending legislation concerning the claims addressed in the Surveyor General's report, stated that "[t]he claimants under the title to Baca * * * have expressed a willingness to waive their older title in favor of the settlers [of the Vegas Grandes land], if allowed to enter an equivalent quantity of land elsewhere within the Territory," and the Committee recommended that the conflict be resolved on that basis. S. Rep. No. 228, 36th Cong., 1st Sess. 4 (1860) (Pet. App. A233). Congress then passed the Act of June 21, 1860, ch. 167, 12 Stat. 71 (Pet. App. A234-A237), in settlement of the New Mexico land claims. Accepting the Senate Committee's recommen-

dation concerning the conflicting Vegas Grandes claims, Congress provided in Section 6 of the 1860 Act, 12 Stat. 72 (Pet. App. A236-A237):

> That it shall be lawful for the heirs of Luis Maria Baca, who make claim to the said tract of land as is claimed by the town of Las [V]egas, to select instead of the land claimed by them, an equal quantity of vacant land, not mineral, in the Territory of New Mexico, to be located by them in square bodies, not exceeding five in number. And it shall be the duty of the surveyor-general of New Mexico, to make survey and location of the lands so selected by said heirs of Baca when thereunto required by them: *Provided, however*, That the right hereby granted to said heirs of Baca shall continue in force during three years from the passage of this act, and no longer.

The Territory of Colorado was organized in 1861. Act of Feb. 2, 1861, ch. 59, 12 Stat. 172. The first laws of the Territory, enacted in 1861, preserved the custom of the appropriation doctrine, which had previously existed in Colorado. Colo. Gen. Laws, 1st Sess., Legislative Assembly, Territory of Colorado 67 (1861); *Coffin* v. *Left Hand Ditch Co.*, 6 Colo. 443, 448 (1882).

A survey of the Vegas Grandes tract showed it to be 496,446.96 acres, and a certificate to that effect was issued to the Baca heirs. *Shaw* v. *Kellogg*, 170 U.S. 312, 315 (1898). In December 1862, the Baca heirs applied, pursuant to Section 6 of the 1860 Act, for the survey and location of the public domain lands in the San Luis Valley that became the Baca Grant No. 4. The tract was surveyed in 1863, and in 1864 title passed pursuant to Section 6. 170 U.S. at 320-322, 342-343.

2. The Colorado courts correctly concluded that no rights founded upon Hispanic law ever attached to Baca

Grant No. 4. As just discussed, prior to 1860, the Baca heirs and a rival group of claimants each asserted rights under Spanish or Mexican law to the Vegas Grandes. As noted in the Senate Report, however, the Baca heirs agreed to *waive* those claims in return for a right to select an equivalent amount of land elsewhere in the Territory. See *Wise* v. *Watts*, 239 F. 207, 224, 226-227 (9th Cir.), cert. denied, 244 U.S. 661 (1917). Congress accepted the proffered waiver by enactment of Section 6 of the 1860 Act, which makes no mention of conferring, with regard to the lands selected under it, any rights special to Spanish or Mexican law. Thus, the Baca Grant No. 4 was founded entirely upon Section 6 of the 1860 Act, which provision was enacted in response to petitioner's predecessors' announced willingness to obviate the need for an adjudication of the conflicting Hispanic grants by waiving their Hispanic land grant claim in return for the grant conferred by Section 6.[5] As the Colorado Supreme Court correctly recognized (Pet. App. A22), "[t]he result was a grant of lands in which no private rights had ever been recognized under the laws of Spain or Mexico and a waiver of a claim to other lands under which such rights could have been asserted by the claimants."

Petitioner's attempts to demonstrate rights based on Hispanic law are unpersuasive. Contrary to petitioner's suggestion (Pet. 18) that the 1860 Act recognized and

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[5] As the Colorado Supreme Court's resolution of the Hispanic land grant claim rested entirely upon its interpretation of Section 6 of the 1860 Act, a provision addressed exclusively to the special grant to the Baca heirs, petitioner's assertion (Pet. 14-16) that this case presents the opportunity for this Court to resolve alleged inconsistencies in state court decisions involving Hispanic land grants misses the mark.

confirmed its asserted Hispanic land grant, Section 6 of that Act indicates that Congress merely acknowledged that there were conflicting Hispanic-law claims to the Las Vegas lands: "[I]t shall be lawful for the heirs of Luis Maria Baca, *who make claim* to the said tract of land as is claimed by the town of Las [V]egas, to select *instead of the land claimed* by them, an equal quantity of vacant land." 12 Stat. 72. Hence, Congress settled the matter without the need for confirming the Baca claim. Nor is petitioner's position supported by this Court's decisions. Petitioner states (Pet. 18) that in *Lane* v. *Watts*, 234 U.S. 525, 528 (1914), this Court recognized that the 1860 Act confirmed the Bacas's Mexican grant. The portion of the *Lane* opinion petitioner refers to, however, merely purported to describe "the allegations of the [plaintiffs'] bill" (*ibid.*); this Court did not comment upon the accuracy of the plaintiffs' allegations. Petitioner's reliance (Pet. 19) on this Court's decision in *Colorado Co.* v. *Commissioners*, 95 U.S. 259 (1877), is also misplaced. *Colorado Company* did not involve Section 6 of the 1860 Act; it concerned a wholly different statute, the Act of July 1, 1870, ch. 202, 16 Stat. 646, which provided for the confirmation of title to a designated amount of lands situated within the original Hispanic land grant.

In short, petitioner's predecessors waived their Hispanic land claims and, instead, acquired title to the Baca Grant No. 4 solely by virtue of federal law, *viz.*, Section 6 of the 1860 Act. Federal land conveyances do not inherently carry water rights; rather, the nature and extent of the water rights, if any, accompanying such conveyances are, unless the United States otherwise provides, determined by the law of the locality in which the tract is situated. *California Oregon Power Co.* v. *Beaver Portland Cement Co.*, 295 U.S. 142, 163-

164 (1935). Because Colorado had already adopted the appropriation doctrine when title to the Baca Grant No. 4 was conveyed in 1864, *Coffin*, 6 Colo. at 446-447, that conveyance did not carry water rights.

3. Petitioner's use of the groundwater beneath the Baca Grant No. 4 would be subject to Colorado law even if that tract had been a confirmed Hispanic land grant. The English and American common law rule was that the surface owner held unlimited dominion over all waters beneath his property. *Acton* v. *Blundell*, 12 M. & W. 324 (Exch. Chamber 1843), discussed in *United States* v. *Cappaert*, 508 F.2d 313, 318-319 (9th Cir. 1974), aff'd, 426 U.S. 128 (1976). The Hispanic law rule was identical. As the Arizona Supreme Court stated in *Maricopa County Mun. Water Conservation Dist. No. 1* v. *Southwest Cotton Co.*, 4 P.2d 369, 372 (1931):

> Both of these systems [the English common law system and the Roman/Hispanic civil law system] distinguish between well-defined natural streams and bodies of water on the one hand, and subterranean, percolating waters on the other. So far as the second are concerned, the principle governing them was, originally at least, the same under both systems. All rights to subterranean waters not flowing in definite known channels belonged to the owners of the soil.

It is well established that the States, under their police powers, may validly enact legislation (such as Colorado's water law statutes) abolishing or modifying "absolute" rights of water ownership where, as here, the affected party was not actually putting the subject water to beneficial use when the legislation was enacted. *Hudson County Water Co.* v. *McCarter*, 209 U.S. 349, 354-356 (1908); *United States* v. *Cappaert*, 508 F.2d at 318-319; *Town of Chino Valley* v. *City of Prescott*, 638

P.2d 1324, 1328 (Ariz. 1981), appeal dismissed, 457 U.S. 1101 (1982); *In re Waters of Long Valley Creek Stream Sys.*, 599 P.2d 656, 663 n.6 (Cal. 1979) (collecting state cases). Hence, petitioner's assertion that its ownership of the Baca Grant No. 4 entitles it to immunity from the Colorado law concerning water rights would fail even if the Baca Grant No. 4 were a confirmed Hispanic land grant.

4. Petitioner also contends (Pet. 23-30) that the award of costs and fees to the objectors violated the Due Process Clause of the Fourteenth Amendment because "it is fundamentally unfair to award attorneys fees and costs in favor of voluntary litigants who are not required to satisfy the most basic, fundamental requirements of standing" (Pet. 26). Petitioner, however, failed timely to raise the due process argument on its appeal to the Colorado Supreme Court.[6] Accordingly, this Court should not further consider that issue.[7]

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[6] The argument was first raised in the petition for rehearing filed by petitioner in the Colorado Supreme Court (Pet. App. A379). Petitioner made no Due Process Clause argument, or even any mention of that provision, in its opening and reply briefs to the Colorado Supreme Court. Petitioner did point out in those briefs that applicable Colorado law states that "any person who wishes" may file an objection to a water rights application, but alluded to that circumstance in arguing that the special Colorado procedures applicable in water rights proceedings do not allow for the award of costs and attorneys fees when a count in an application is voluntarily dismissed (*id.* at A371-A376). The only due process concern petitioner raised in the trial court was its assertion that the court was obligated to hold an evidentiary hearing prior to ruling on the voluntary dismissal motion (*id.* at A299-A306, A310-A321). Petitioner did not raise that due process contention in its appeal to the Colorado Supreme Court, nor does it do so now.

[7] Although petitioner asserts that the Colorado statutes allow any person, no matter how remote his interests, to file an objection

Petitioner also contends (Pet. 29) that "due process was * * * violated because [petitioner] was never afforded a full and fair opportunity to contest the Objectors' entitlement to the award." As the Colorado Supreme Court pointed out (Pet. App. A57-A58), however, the trial court received briefs from the parties and held a nonevidentiary hearing prior to ruling on the motion for voluntary dismissal of the tributary claim without prejudice. Hence, petitioner had ample opportunity to recommend to the court that the tributary claim should be dismissed with prejudice, or that it should be tried, rather than dismissed without prejudice but subject to the condition that the objectors be awarded the fees and costs they had incurred in defending against that claim. Petitioner, however, never asserted that it would prefer to suffer dismissal with prejudice or proceed to trial on the claim rather than have the motion conditionally granted. Hence, petitioner's contention that it was denied a full and fair opportunity to contest the objectors' entitlement to the award of costs and fees is meritless.[8] Petitioner's suggestion (Pet. 29-30) that the court was obligated by the Due Process Clause to

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to a water rights application, petitioner has never contended that any of the objectors to whom the trial court awarded costs and fees have no immediate interests in the present controversy. Indeed, as to the United States, the trial court entered a finding stating that "[b]ased upon the evidence * * * this Court can readily find, as a matter of both federal and Colorado law, that the federal reserved water rights would be materially injured by the Applicant's proposed ground water withdrawals." Findings of Fact, Conclusions of Law, Judgment and Decree 56 (Feb. 10, 1992).

[8] Petitioner does not now assert that the disposition of the motion required the trial court to resolve disputed issues of material fact, nor did it so argue on its appeal to the Colorado Supreme Court.

furnish petitioner, in advance of ruling on the motion, with the precise amount of costs and attorneys fees that would ultimately be imposed if the motion were to be conditionally granted was not raised below and, in any event, is insubstantial.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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